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SUPREME COURT OF THE UNITED STATES.

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COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR THE DEFENDANT

BY

C. W. MAY,
MOLLOHAN, MCCLINTIC AND MATHEWS, AND
CHAS. E. HOGG.

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UPREME COURT OF THE UNITED STATES.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR THE DEFENDANT.

ATEMENT OF THE CASE UPON DEMURRER.

On January first, 1861, Virginia was indebted on account the issuance of bonds at various times prior thereto in the gregate amount of $31,800,712.90, upon which past due erest including the interest maturing on that date ounted to $1,045,183.01.

On July first, 1863, a date ten days subsequently to the nission of West Virginia as a State into the Union, the bill ows a public indebtedness of the plaintiff, including princi- l of said bonds and the interest accrued and unpaid ereon, amounting in the aggregate to $39,098,922.00. Of s sum, $5,954,716.08 is interest, and the residue, 3,141,212.92, is principal, representing the entire in- otedness against the State of Virginia at the time of the rmation and admission into the Union of West Virginia. is indebtedness was held by private owners of bonds which rginia had issued and sold upon her own account.

In 1871 the Legislature of Virginia passed an act pro- ling for the funding and payment of her public debt, in

which, among other things, there is recited that the people of Virginia being anxious for the prompt liquidation of her portion of the said debt, which was estimated by said act to be two-thirds of the entire indebtedness incurred by the State of Virginia, and also suggesting that the authorities of West Virginia might prefer to pay that State's portion of the said indebtedness to the holders thereof, and to enable the State of West Virginia to settle her portion of the said debt with the holders thereof, allotted to West Virginia by her own *ex parte* and *gratuitous* act the payment of the other third of said debt. The act provides for the surrender of the old and the acceptance of the new bonds of Virginia for two-thirds of the amount of said aggregate indebtedness, and the issuance to the owners or holders of the other one-third of the amount due upon the old bonds, certificates bearing the same date as the new bonds representing the funded debt of Virginia, setting forth the form of the bond which is not funded, and the payment thereof to be provided for in accordance with such settlement as might thereafter be had between the States of Virginia and West Virginia.

In 1879 a further act was passed by the Legislature of Virginia regarding her said debt, which provides, among other things, for the issuance of certificates on West Virginia to the holders of the old bonds who had not already received such certificates, and that the State of Virginia would aid the holders of certificates issued by Virginia, in negotiating with the State of West Virginia for an amicable settlement of all the claims of such creditors holding the certificates issued by Virginia against the State of West Virginia, and that the acceptance of such certificates for West Virginia's one-third issued under the acts of the Legislature of Virginia, should be taken and held as a full and absolute release of Virginia from all liability on account of said certificates.

In 1882 another act was passed by the Legislature for the express purpose of ascertaining and declaring Virginia's equitable share of the debt created before and actually exist-

ing at the time the State of West Virginia was formed, the design of which act was to make a full settlement of said debt, and thus present a true state of the account between Virginia and her creditors, which embodies a recital to that effect, and which provides for the issuance of certain certificates by the Commonwealth of Virginia, covering the one-third of her indebtedness claimed to be payable by the State of West Virginia, and there is recited in the form of said certificate that the Commonwealth of Virginia has discharged her equitable share of her debt evidenced by such certificate, leaving a balance with interest to be accounted for by the State of West Virginia, without recourse upon the Commonwealth of Virginia. These certificates were accordingly issued by Virginia and received and accepted by the holders of that part of the original debt represented by said certificates, all of the old bonds surrendered to the Commonwealth of Virginia and cancelled, and Virginia thereby relieved from all liability on her own account to the holders of the West Virginia deferred certificates.

The only obligation left upon Virginia after the issuance of these deferred certificates purporting to represent West Virginia's portion of the debt of Virginia gratuitously fixed *ex parte* by the State of Virginia, and accepted by the holders of that part of the original debt of Virginia in settlement thereof, was to use her offices and endeavors to effect payment thereof, or its adjustment in some way, by the State of West Virginia. By this arrangement, effected alone by the State of Virginia with her creditors, she was relieved from all substantial liability—in fact from any pecuniary liability—as to the one-third of her indebtedness created by her prior to the formation and admission into the Union of the State of West Virginia.

This suit was instituted in part for the recovery of that portion of the debt of Virginia created prior to and existing on June 20, 1863, the date of the admission of West Virginia into the Union and is the gravamen of the complainant's bill.

Another claim asserted by said bill is an alleged indebtedness evidenced by the bonds of Virginia and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of said State, as created under her laws, amounting, the former to $1,462,993.00, and the latter to $1,543,669.00, as of the date of January first, 1861.

This cannot be treated as a debt within the meaning of that term to be asserted against the State of West Virginia, because these Commissioners were simply agents for the management and control of a part of the internal fiscal affairs of the Commonwealth of Virginia, and the use of which was and is available only to the State of Virginia for the advancement of her own peculiar State interests.

Another and further claim made by the said bill is for the collection or payment for all property, real, personal and mixed, owned by or appertaining to the said State of Virginia, and being within the boundaries of the State of West Virginia, which passed to and became the property of the latter State, and was taken and appropriated to her own use by the State under the provisions of an act passed by the State of Virginia, in February, 1863, the bill alleging that the property passing to the State of West Virginia under and by virtue of the said act, consisted of a number of items alleged to amount in the aggregate to several millions of dollars, the exact amount of which complainant, it is alleged, is unable to definitely ascertain and state.

These three classes of claims made by the complainant in her bill constitute the sum total of the demand made by her against the defendant in this suit.

The first effort of Virginia to fund her said debt was the Act of the General Assembly approved March 30, 1871, in which she declared her portion thereof to be two-thirds, and provided a plan for its funding and payment, and as to the residue thereof this Act declares:

> "Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as

provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees; and provided further, that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds, in the manner now prescribed by law, two-thirds of the interest accruing on the principal of said bonds, after July first, eighteen hundred and seventy-one, and for the interest accrued to said date certificates dated on that day shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid on the bonds. The remaining one-third of unpaid interest, both on the bonds and certificates, shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia."

(Plaintiff's Bill, pp. 14, 15.)

Under the terms of this statute Virginia still remained liable for the payment of her entire debt including the one-third, unfunded, for which deferred payment certificates were to be issued, payable upon final settlement between Virginia and West Virginia.

The next effort of Virginia to adjust her bonded indebtedness created prior to the formation of West Virginia as a State, was the Act of her General Assembly, approved March

28, 1879, whereby she provided an abatement of the rate of interest and divided her then outstanding indebtedness into two classes, as follows:

> "Class I, which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds.
>
> "Class II, which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one, as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds."
>
> (Plaintiff's Bill, pp. 17, 18.)

This act also further declares as to the liability of West Virginia touching the said indebtedness of the complainant, as follows:

> "The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange, and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued, under this act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability on account of said certificates."
>
> (Plaintiff's Bill, p. 19.)

Under these acts of the Legislature of Virginia, nearly if not quite all of her said indebtedness was funded on the basis prescribed by these enactments, thus relieving her of all liability upon the one-third part of her original ante-bellum obligations.

A third expression of Virginia touching her said debt, so far as the same relates to West Virginia, is that embraced in an Act of her Legislature approved February 14, 1882, which is entitled as follows:

> "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon."
>
> (Plaintiff's Bill, p. 21.)

This act contains an extended preamble setting forth what purports to be an account between the state and her creditors, showing the aggregate of principal and interest in two distinct totals in separate columns, declaring the assumption of two-thirds thereof as her equitable portion, fixing the total amount of this equitable portion as of July 1st, 1882, at $21,035,377.15, and then provides for the funding of this debt by the issuance of bonds drawing interest at the rate of three per cent.

This act also further provides as follows:

> "For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:
>
> "No. .....
>
> "The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ..... dollars, held by ....., dated the .... day

of ....., and numbered ....., leaving a balance of ..... dollars, with interest from ....., to be accounted for by the State of West Virginia, without recourse upon this Commonwealth,

"Done at the capitol of the State of Virginia, this ..... day of ..... eighteen .....

"....., *Second Auditor.*

"....., *Treasurer.*"

(Plaintiff's Bill, pp. 28, 29.)

A further act of the General Assembly of Virginia was passed, approved February 20, 1892, which bears the following title:

> "An act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882."
>
> (Plaintiff's Bill, p. 31.)

This act provided for the issuance of nineteen millions of dollars in bonds in lieu of twenty-eight million dollars of outstanding obligations of Virginia, not funded under the act approved February 14, 1882, hereinbefore mentioned, and prescribed the form of the new bonds to be issued under this act and the coupons thereof.

This act also provides that in taking up these outstanding bonds before issuing new bonds in lieu thereof there shall be deducted "one third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy-one, and also deducting one-third of the principal and interest of such obligations as are issued under the act approved the thirtieth

day of March, eighteen hundred and seventy-one, as do include West Virginia's portion."

This act further provides as follows:

> "For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:
>
> "No. ..... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for .....dollars, dated ..... day of ....., and No. ....., leaving a balance of ..... dollars with interest from ..... to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth.
>
> "Done at the capitol of the State of Virginia, this ..... day of ....., eighteen hundred and ninety-two.
>
> "....., *Second Auditor.*
> "....., *Treasurer.*
>
> (Plaintiff's Bill, pp. 35, 36.)

By virtue of this act of legislation Virginia made a further considerable reduction of the principal of her debt and received a more favorable rate of interest and better terms as to its payment.

After the lapse of about two years from the approval of the act last named a joint resolution was adopted by the legislature of Virginia, entitled as follows:

> "'A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same."
>
> (Plaintiff's Bill, p. 39.)

This resolution was approved March 6, 1894, and in its preamble refers to the acts by their titles, passed by the General Assembly of Virginia relating to her debt, concluding the preamble of this resolution as follows:

> "Whereas the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state."
>
> (Plaintiff's Bill, p. 40.)

The resolution then creates a commission "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia."

> "But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the state through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof.
>
> "All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the state to any expense on this account."
>
> (Plaintiff's Bill, pp. 40, 41.)

A further act was passed by the Virginia legislature, approved March 6, 1900, reciting the previous acts of said legislature relating to the public debt of said state, and also reciting that,

> "Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to wit: One-third of the amount of said obligations, of which certificates this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund, and * * *
>
> "Whereas, it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificates which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt * * * and take upon deposit the certificates aforesaid, or have the same otherwise held or placed on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder. If at least two-thirds in amount of said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the

advice and approval of the attorney general of Virginia, to take such action and institute such proceedings on behalf of the state as may, in the judgment of said commission and attorney general, be needful and proper to protect the interest of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders, as provided in the joint resolution aforesaid, and the state shall not be subject to any expense on that account."

(Plaintiff's Bill, pp. 41, 42.)

In accordance with the provisions and requirements of said act approved March 6, 1900, said commission entered into an arrangement with the duly authorized representatives of the holders of the deferred certificates issued by Virginia, without recourse upon her and received by her creditors in settlement of one-third of the original debt, whereby said commission reduced to its possession and control more than five-sixths of the entire amount of these certificates outstanding and the said commission now holds said certificates in trust for the present owners thereof, the amount of which certificates has, no doubt, largely increased since the institution of this suit, as indicated by a statement contained in the report of said commission submitted to the General Assembly of Virginia, thus placing in the possession of said commission nearly or quite all of said certificates.

The ownership of these certificates held by said commission is still in the original holders of the old debt of Virginia, and their possession by said commission is solely for the purpose of giving color to the institution of a suit in this court by the state to promote the collection of an alleged debt payable—not to the plaintiff—but to various private persons represented by the committee who assembled these certificates and turned them over to the said commission.

That this is the extent of the interest which the said commission created by the State of Virginia has in the said

certificates, a demand for the payment of which constitutes the gravamen of the bill filed in this suit, is clearly apparent from the agreement entered into between the said commission and the committee representing the holders of said certificates, and the parts of said agreement relating to this feature of the case are here copied and are as follows:

> "The said Virginia commission hereby stipulate and agree by and with the advice and approval of the attorney general of Virginia, that, in their judgment, it is needful and proper, in order to protect the interests of the state and bring about and carry into effect a settlement in the premises, that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States, asking for an adjudication and settlement by that court of the matters aforesaid unsettled and undetermined between the two states, arising and growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia of March 6, 1900, referred to in the said contract of December 14, 1904; and the said Virginia commission acting by and with the advice and approval of the attorney general of that state, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid, as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the General Assembly of March 6, 1894, also referred to in said contract of December 14, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia, as to the deferred certificates placed subject to the control of the commission

as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said commission, notwithstanding the institution and pendency of such suit.

"And the Virginia commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and Act of the General Assembly of Virginia, they will account for, pay over and deliver such amount, either in cash or securities, as may be realized from West Virginia through any settlement made by the said commission with that State, either by means of an adjudication or a recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, to the said Depositing Committee in full settlement and satisfaction of all claims under said certificates; and the said Depositing Committee agree on behalf of the depositors of said deferred certificates so placed to the control of the said commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates, and on account of the bonds represented by and mentioned in the said certificates respectively, in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

"It is further understood and agreed that if from any cause the said commission shall fail or be unable to bring about such adjustment or settlement, or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said commission to restore to the control of the said Depositing Committee all such deferred certificates as may have been

placed subject to the control and disposal of the said commission as aforesaid."

(Plaintiff's Bill, pp. 84-86.)

We have thus given in brief outlines the material facts appearing upon the face of the record of the bill and its exhibits, and which declare the true and legal status of this suit at its very threshold.

The Propositions Raised by the Demurrer.

The case as made by the bill and its exhibits presents several vital points for consideration arising upon the demurrer interposed by the defendant, which may be thus particularized:

I. Is this a controversy between two states within the meaning of section 2, art. 3 of the Constitution?

II. Does the complainant have such an interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her standing in a court of equity?

III. Have not the real owners of these certificates such a substantial interest and right of ownership therein as to make them indispensable parties, and whose presence would oust the court of jurisdiction in respect to this feature of the bill?

IV. Does the fact that the commissioners of the Sinking Fund and Literary Fund of Virginia have in their possession certain small portions of these certificates thus issued by the plaintiff to herself give her any cause of action against the defendant in respect thereto?

V. Does the claim for property transferred by the plaintiff to the defendant contained within the boundaries of the territory out of which West Virginia was erected into an independent state, create any right of action on the part of Virginia against her for the value of this property?

VI. If this does afford the plaintiff a cause of action must it not be asserted at law, and not in a court of equity?

VII. Does the bill disclose any authority from Virginia directing a suit for the recovery of the value of property transferred by her and used by the defendant?

Relation of Virginia to the Old Debt.

In determining whether the bill and its exhibits present a controversy between two states within the meaning of section 2, article 3, of the Constitution, the relation of Virginia to her old debt will not be overlooked. Before the formation of West Virginia it must be conceded that Virginia was morally and legally bound for the whole debt which she had created by the issuance and sale of her bonds. At that time her entire territory was intact and all her resources unimpaired, in so far as they were not affected by the ravages of war, for which, of course, her creditors were not responsible.

In 1862, of her own accord, she parted with a portion of her territory, and gave her free consent to the creation of a new and independent state out of the territory by her thus surrendered. This, however, did not impair her liability upon this debt, nor any part thereof, to her creditors holding the bonds which she had issued, or in any manner lessen her obligation for their payment.

This must be conceded upon the well recognized principles of international law.

> Higginbotham *v.* The Commonwealth, 25 Gratt. (Va.) 627.
>
> Taylor, Int. Pub. Law, pp. 203, 204, Sec. 166.
>
> Halleck, Int. Law Vol. 1, p. 76.
>
> Hall, Int. Law, Sec. 27.

Mr. Taylor in his recent and very able and clear treatment of the effect of a dismemberment of a state upon its obligations, presents the subject in two aspects: First, when a portion of its territory and population have been taken by conquest to form an integral part of another state; second,

when the severed territory is erected into a new and independent state. We are interested in the latter feature of the subject, upon which this distinguished author says:

> "A narrower and more technical rule prevails when the parent state is deprived of a portion of its territory which is erected into an entirely distinct political community. The cogent reason in such case is that as a man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a state that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. 'Such a change,' says Hallock, 'no more affects its rights and duties than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to as well as from the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.' In other words, as the old state continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties, with full liability for all general obligations with which the new creation taken from its side may disavow all legal connection."

The high moral obligation and legal duty on her part to meet her indebtedness still remained, with the right to treat, upon terms fair and just, with her creditors, for its adjustment and settlement. Accordingly, therefore, Virginia proposed to treat with her creditors with reference to the debt she had contracted, and submitted to them through her legislative department a proposition for its adjustment and ultimate liquidation. The terms of settlement were those which she herself proposed, and were met by her creditors in a broad spirit of liberality and compromise.

As the basis of settlement Virginia offered to pay two-thirds of her old or original debt by the issuance of new bonds by her, resting this proposition upon the consideration that one-third of her territory had passed to the new

state after the debt had been contracted, proposing to issue contemporaneously with such new bonds certificates payable by West Virginia, for the other third of the debt, which Virginia did not feel inclined to pay for the reason just stated, and these certificates were accepted by the creditors without recourse upon Virginia, in payment or settlement of this one-third of her debt, thereby releasing Virginia from the payment of the one-third of her old original debt.

Thus Virginia adjusted and settled her former indebtedness contracted prior to June 20, 1863, on the basis and upon the terms fixed by herself and by negotiations to which she and her creditors alone were parties.

As a part of the consideration of this settlement with her creditors, Virginia agreed to aid them in collecting these certificates from West Virginia, amicably if she could, but by an action if necessary.

By this composition with her creditors Virginia extinguished her old debt—the one for any part of which West Virginia was, or could have been made, liable to the owners or holders thereof—and created a new debt of her own, in the creation of which West Virginia had no part or agency.

This new debt Virginia herself recognizes as her own, for which she alone is liable, and does not by this suit, or in any other manner, seek to make West Virginia liable, or for any part thereof.

This new debt, founded upon the consideration of a liability attaching to the old one, constitutes a valid and subsisting obligation of Virginia, and her promise to aid the holders of the certificates issued by her against West Virginia is a mere collateral agreement, and does not add to or detract from the validity of the new debt.

Thus it will be perceived that Virginia has discharged her obligation to her creditors arising from the debt which she contracted before the division of her territory, and in that debt she is no longer interested pecuniarily, and that

the only persons who are so interested are the owners of the certificates representing the one-third of the original debt.

The only claim which the holders of these certificates have upon Virginia, so far as these certificates are concerned, rests upon her promise to aid in their collection, which is but collateral, and can only be construed to mean that she will exert her moral influence to constrain West Virginia to recognize so much of the old debt as may be represented by the aggregate of these certificates.

The Status of West Virginia with Reference to the Old Debt of Virginia.

Initiatory to the formation of the new state, on August 20th, 1861, Virginia, through the convention which had restored the government of the State of Virginia, promulgated an ordinance to provide for the formation of a new state out of a portion of that state, in which, among other things, is the following declaration as to the debt of Virginia:

"The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of the said debt was contracted and deducting therefrom all the moneys paid into the treasury of the commonwealth from the counties included within the said new state during said period."

This is Virginia's own declaration made as aforesaid as to how West Virginia's part or share of the old debt shall be ascertained and determined. And if the same were obligatory, the means of reaching a proper conclusion on this basis have always been within the possession and exclusive control of Virginia. They are to be found in her own

archives of state, which have at all times been in the custody of her own officers.

The Constitution of the new state at the time of her admission into the Union contained with reference to said debt, the following provision:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The constitution containing this clause was framed and adopted subsequently to the adoption of the ordinance aforesaid by the State of Virginia.

The ordinance and legislation of Virginia looking to and providing for the erection of a new state out of a part of her own territory, were adopted and passed without the privity or consent of her creditors.

Then upon the division of the territory of Virginia, if the obligation of West Virginia, as claimed by some, to the creditors of Virginia became a joint liability as to which the two states were bound, and it appears to have been so regarded by Virginia, as the course she has pursued with reference thereto would seem to indicate, this suit as to said debt cannot be maintained.

Because, when the creditors of Virginia accepted new bonds in payment of the old bonds and surrendered the latter for cancellation and such cancellation was effected, all liability upon the part of West Virginia ceased and determined, and the issuance of certificates by the State of Virginia, mere *ex parte* memoranda, to be paid by West Virginia, was a mere gratuity which could not operate as a modus to give vitality to any part of the old debt which Virginia had fully discharged by her own composition with her creditors.

Here was an act of one claiming to be jointly liable with another whereby that one pays in new evidences of debt two-thirds of it, with an agreement of release as to the entire liability which must by the very act itself operate as a discharge of the other debtor. This must be the effect upon the well recognized principle of the law of contracts that the discharge of one joint obligor relieves the other from liability, in the absence of a valid stipulation to the contrary to which the parties in interest are privy.

It may be contended, however, that the principle here relied on does not apply to the transactions of sovereign states in matters of public concern. Nevertheless, when governments come into courts of justice for the determination of a controversy, they submit themselves to the ordinary rules of law which govern in such cases, and the same principles which would apply to private persons are also applicable to them. When they become suitors they no longer occupy the lofty attitude of sovereigns, so as to place themselves above and beyond the ordinary standards of right and wrong, but in the very nature and condition of things, these standards must be invoked or the courts themselves could not act as judicial tribunals.

If this were not so, the court's proceedings would necessarily be discretionary and capricious, without any established rules to govern their action. This is the principle which obtains and governs in cases of this character, even though the proceedings be by suit in equity.

United States *v.* Bank of the Metropolis, 15 Pet. 377; 10 L. ed. 774.

United States *v.* Flint, 4 Sawy. 42 Fed. Cas. No. 15,121.

United States *v.* Union Nat'l Bank, 10 Ben. 408, Fed. Cas. No. 16,597.

Rhode Island *v.* Massachusetts, 12 Pet. 657, 738, 743.

9 L. ed. 1233, 1266, 1267.

This is Not a Controversy Between Two States.

As already shown, Virginia has been released from the payment of one-third of her debt contracted before the formation of West Virginia, and has arranged for the payment of the two-thirds thereof by new bonds issued by her, and that she has no substantial interest in the third thereof for which she issued her own certificates without recourse upon herself, to be paid by West Virginia, the old bonds having been surrendered and canceled.

The record discloses that she has no interest in these certificates, as they impose no obligation upon her, and leave the creditors without any right of action or demand against her upon the failure or refusal of West Virginia to assume their payment. It also appears from the record of the bill and its exhibits that upon the failure of the commission into whose hands these certificates were placed to collect these certificates, that they are to be surrendered to the committee representing the owners thereof, and in the event that suit should be brought by Virginia against West Virginia, that the owners are to defray all expenses including the fees of counsel, and that no decree can be entered in this cause that will inure to the benefit of the plaintiff.

No one can examine the bill and its exhibits in this suit without being satisfied beyond all doubt that it is in legal effect commenced and now prosecuted, so far as said certificates representing the old debt are concerned, solely by the owners thereof and for their benefit and not for the State of Virginia. No decree as to these certificates can inure to the benefit of Virginia. Her only relation to them is her assurance to their holders that she will aid them by bringing suit in reference thereto at the expense of the owners. She is the merest nominal plaintiff carrying on the suit in her own name with an immunity from all costs of any character whatsoever.

This suit is governed, so far as the demand respecting the old debt of Virginia is concerned, by the well settled principles already laid down by this Honorable Court in the following cases:

New Hampshire *v.* Louisiana, and New York *v.* Louisiana, 108 U. S. 76, 27 Law. ed. 656.

See also in this connection *Re* Hartung, 98 Wis. 140 73 N. W. 988; People *v.* General Electric Ry. Co., 172 Ill. 129, 50 N. E. 158.

To create a controversy between two states, it seems to us that there must be an assertion of a substantial right of one state as such which is denied or repudiated by the other, and which relates to the interests of each as states, and that the determination of the issue thus raised will promote or secure some substantial right of the one or the other of these states as states.

This may be illustrated by some of the decided cases, in each of which it was held that the contention involved a controversy between states.

New Jersey *v.* New York, 5 Pet. 285, 8 L. ed. 127; Rhode Island *v.* Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Florida *v.* Georgia, 11 Howard 293, 13 Law. ed. 702; Virginia *v.* West Virginia, 11 Wall. 39, 20 L. ed. 67, were cases in equity and all involved state boundaries; Pennsylvania *v.* Wheeling Bridge Company, 9 How., 657; 13 L. ed. 294; S. C. 11 How. 528, 13 Law. ed. 799; S. C. 13 How. 518, 14 Law. ed. 249; S. C., 18 How. 429, 15 Law. ed. 436, was a case in equity involving the free and unobstructed navigation of the Ohio river which caused a special damage to the plaintiff state for which there was no adequate remedy at law.

These cases just cited present an exercise of jurisdiction in cases directly affecting the property rights and interests

of a state and that over lands and their inhabitants claimed by the states themselves.

Missouri *v.* Illinois, 180 U. S. 206, 45 L. ed. 497, involved a case in which the health and comfort of the inhabitants of a state were threatened.

South Dakota *v.* North Carolina, 192 U. S. 289, 48 L. ed. 488, was a suit in which the plaintiff sought the enforcement of the payment of a debt belonging exclusively to the plaintiff and no one else had any interest therein, and the jurisdiction was sustained by a majority of the court.

In the suit now before the court what interest can Virginia claim against West Virginia in certificates that do not belong to her and in which she can assert no interest? She cannot maintain a suit to vindicate her integrity in the matter of the issuance of these certificates. This is entirely too flimsy to constitute the basis of a controversy, and besides this, the act or its motives has not been assailed or questioned by West Virginia.

The conclusion is irresistible that Virginia has no interest in this suit so far as it is designed to enforce payment of the debt represented by said certificates, that it is being prosecuted for their owners and that as to such matters there is no controversy between the two states, and that the bill as to this matter must be dismissed.

II.

THE COMPLAINANT HAS NOT SHOWN SUCH INTEREST IN THE DEFERRED CERTIFICATES AS GIVES HER ANY STANDING IN A COURT OF EQUITY.

Does the Commonwealth of Virginia have such an interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her any standing in a court of equity in relation thereto?

As we have already seen, the former owners of the old debt are the present owners of these certificates; that they were placed in the hands of a committee whose members these owners had chosen, and this committee delivered the certificates to a commission selected under a joint resolution of the General Assembly of Virginia, who were empowered to collect these certificates for the owners at the sole expense of such owners.

The right of Virginia to maintain a suit as sole plaintiff therein, must be determined by the well settled rules of equity practice as recognized and enforced by the English Court of Chancery, and as understood and applied by this Court.

Virginia has no interest in these certificates, nor can her interests be in any manner affected by a decree in relation to these certificates.

She is not a guarantor because their issuance is based upon the condition of her non-liability in any event, and as a consideration of her release from all liability upon these certificates, and the portion of the debts represented by them, she issued new bonds for her old debt, and was acquitted from all obligation as to these certificates. In what way can she be interested in this suit so far as it relates to these certificates? Does her interest at most exceed that of

a mere committee representing the holders thereof? Has she any connection with them except by her agreement to aid their holders in an effort to enforce their collection? Has she not constituted herself a mere medium for the institution of this suit in her own name for the use and benefit of the holders and owners of these certificates?

If she has any connection with this part of the suit it is as its mere promoter, by virtue of her promise to the holders of the certificates—an agent for them—only an instrumentality for the institution of this suit.

This is not such interest as to support a suit in equity. The plaintiff's interest must be as substantial and certain as that of the defendant.

A person having no interest, legal or equitable, in land, beyond a mere possession, cannot maintain a bill in respect thereto.

Smith *v.* Hollenbeck, 46 Ill. 252.
Smith *v.* Brittenham, 109 Ill. 540.

> "A complainant in chancery must have an interest in the subject matter of the controversy. Unless a complainant has some interest in the property in controversy his bill cannot be maintained."
> Smith *v.* Hollenbeck, *supra.*

In Smith *v.* Brittenham, *supra*, the court in its opinion, discussing the insufficiency or want of interest in the plaintiff to maintain the suit, says:

> "It is a well recognized rule that in equity the party having the beneficial interest in the subject matter of suit must sue in his own name for any invasion of his rights in respect thereto, although the legal title thereto may be in another. (Frye *v.* Bank of Illinois, 5 Gilm. 332; Elder *v.* Jones, 85 Ill. 384; Moore *v.* School Trustees, 19 *id.* 83.) It is also settled that no one, in the absence of statute authorizing it, can maintain a suit in chancery with respect to real estate to which he has neither the legal nor equitable

title. (Bowles *v.* McAllen, 17 Ill. 30; Horace *v.* Harris, 11 *id.* 24.) If such an interest in the plaintiff is indispensable to the commencement of this suit, as will be conceded, the conclusion would seem to follow that where a party having such interest commences a suit, and before any hearing or disposition of the cause upon the merits, voluntarily transfers his interests to another, and the same is made to appear of record, as is the case here, the whole proceeding will become so defective for want of proper parties, that no valid decree can be entered in the cause until the complainant's assignee, by supplemental bill or otherwise, makes himself a party complainant to the suit—and this, indeed, is the well recognized doctrine and practice in such cases. Mason *v.* York & Cumberland R. R. Co., 52 Me. 82."

"Where the wrong complained of is one in which the State has no direct interest, any more than it has in an ordinary controversy between individuals, the State is not a proper party plaintiff, and the suit should be instituted by the particular individual who will be injured."

10 Enc. Pl. & Pr. 903, 904, and the very numerous cases cited in Note 1.

"The rule is fundamental that no person can maintain a suit respecting a subject matter with reference to which he has no interest, right or duty, either personal or fiduciary."

Hogg's Equity Procedure, sec. 37, p. 40, citing Baxter *v.* Baxter, 43 N. J. Eq. 82, 10 Atl. Rep. 814; Ashby *v.* Ashby, 39 La. Ann 105, 1 So. Rep. 282.

In Ashby *v.* Ashby, *supra*, the syllabus of the case is as follows:

"An action can only be brought by one having a real and actual interest which he pursues. So, where one claiming to be a judgment creditor of another seeks to annul a mortgage executed by the latter in favor of his children on the ground of fraud, and the record shows that the judgment on which the suit is

> founded is not in favor of the plaintiff, but in favor of her minor children for whom she was tutrix, and who had attained their majority before the action of nullity was brought, and they did not join in the action, the suit must be dismissed."
>
> "Where a bill is filed for relief, it must be prosecuted in the name of the real party in interest."
>
> Oakley v. Bend 13th Edw. Ch. (N. Y.) 482.

The doctrine here cited is supported by numerous authorities, among which are the following:

> Field *v.* Maghee, 5 Paige (N. Y.) 539; Rogers *v.* Traders' Ins. Co., 6 *id.* 583; Sedgwick *v.* Cleveland, 7 *id.* 267.

It can not be contended that because the State of Virginia has constituted herself an agent or representative of the holders of the certificates mentioned in the plaintiff's bill that this gives her any right to maintain the suit in her own name.

From the opinion delivered in Oakley *v.* Bend, *supra*, we take the following:

> "A person who is a mere agent to sue for and collect money under a power of attorney, can not be a party to a bill for an accounting in his own name, nor be joined as a co-plaintiff with his principal. King of Spain *v.* Machado, 4 Russ. 225, 240, recognized in Clarkson *v.* Depyester, 3 Paige, 337, as good ground of demurrer. As a general rule, if an agent institutes a suit under an authority from his principal, he must do so in the name of his principal. Lee *v.* Thomas 2 Ves. 313. And see Calvert, Parties, 229, 232, for the authorities on the subject."

The doctrine set forth in these authorities and cases is so firmly settled that further discussion or citation would seem superfluous, and an annoyance to, and tax upon the time and patience of the court required for their notice or examination.

III.

THE REAL OWNERS OF THE DEFERRED CERTIFICATES HAVE SUCH A SUBSTANTIAL INTEREST AND RIGHT OF OWNERSHIP THEREIN AS TO MAKE THEM INDISPENSABLE PARTIES, WHOSE PRESENCE WOULD OUST THE COURT OF ITS JURISDICTION.

The practice in this court in cases in equity is regulated by the former practice of the courts of chancery in England. And in cases of original jurisdiction it will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and follows the general rules of that court in conducting a cause to a finality.

> California *v.* Southern Pacific Railroad, 157 U. S. 229, 249, 39, L. ed. 683, 690.

The only instance wherein the court will deviate from or refuse to follow this practice is when it impairs the case by unnecessary technicalities, or defeats the purpose of justice.

> California *v.* Southern Pacific Ry. Co., *supra;* citing Florida *v.* Georgia, 58 U. S., 17 How., 478, 15 L. ed. 181.

The general rule as to parties in equity as followed in English chancery practice, was well settled at the time the jurisdiction of the Supreme Court of the United States was created, and is thus laid down by Mr. Daniell:

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent further litigation. For this

> purpose all persons materially interested in the subject ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or should have served upon them a copy of the bill, or notice of the decree, to have an opportunity afforded of making themselves active parties to the cause if they should think fit."
>
> 1 Daniell's Ch. Pl. & Pr. (4th Am. Ed.) 190.

This rule under some circumstances, not important to be considered here, may be dispensed with when its application becomes extremely difficult or inconvenient.

Equity Rule 48.

This court, in Caldwell *v.* Taggart, 4 Pet. 190, 7 L. ed. 828 says:

> "The general rule is that however numerous the persons interested in the subject of the suit, they must all be made parties plaintiff or defendant, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit; to make performance of the order perfectly safe to those who have to obey it, and to prevent future litigation."

In Barney *v.* Baltimore, 73 U. S., 6 Wall., 280, 18 L. ed. 825, speaking with reference to the subject of parties, the court decides as follows:

> "Courts of chancery will refuse to make a decree where, by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interests of the absent parties."

In Shields *v.* Barrow, 58 U. S., 17 How., 130, 15 L. ed., 159, the subject of parties to suits in equity received a very thorough consideration at the hands of the court, whose opinion was delivered by Mr. Justice Curtis, and in which he

classifies parties to a bill in equity as follows: Formal parties; second, necessary parties; third, indispensable parties. Those under the second class include all persons having an interest in the controversy, and who ought to be made parties in order that the court may act upon that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. If the interests of this class of parties are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, then the latter are not indispensable parties.

Those coming under the third class are those persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting the interest, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience.

This well considered opinion, which has been followed in many subsequent cases, contains several illustrative cases of the rule here announced as to the classification of parties to a bill in equity.

One of the points in the syllabus of the last case cited states the rule as follows:

> "Persons having rights which must be affected by the decree cannot be dispensed with."

In the case before the court the holders of the deferred certificates, who own both the legal and equitable title thereto, are not made parties. The only plaintiff seeking relief is the State of Virginia, who has brought the suit in her own name without any title to this part of the subject matter of the suit, and without any direct or substantial interest in the result thereof. The purpose of this suit is to settle the liability of West Virginia on these deferred certificates to the owners and holders thereof, and any decree which is rendered in this case must relate solely to their rights. The court can

not enter any decree with reference to these certificates which must not necessarily affect the interests of these outstanding owners and holders, who are not before the Court either as plaintiffs or defendants.

The purpose of the bill is not only to fix a liability on the State of West Virginia for the payment of these certificates, but also for an accounting to determine the extent of this liability. So it is clearly and at once perceivable that the holders of these certificates are vitally interested as to both of these purposes of the suit.

Therefore, as these persons have no opportunity to be heard, and as the decree can not bind them, the court cannot, for that very reason, afford any relief to the nominal plaintiff, the Commonwealth of Virginia, in this suit.

Suppose it be contended that these bonds are now held by the Commission created by the State of Virginia, apparently possessing powers to act as a corporate body, to negotiate with reference to these certificates, and that this commission holds the bonds in trust, as it evidently does, for the bond holders. Would not the Commission at least, acting in its fiduciary capacity, be an indispensable party to this suit? Could the State of Virginia, divested of all interest in these certificates, sue in her own name both for this commission and the beneficiaries, who are the owners of these certificates? This Commission being a creature of the legislature of Virginia, endowed with corporate capacity to act in furtherance of the objects of its creation, is evidently interested in carrying into effect the steps which it has taken to secure the payment of these evidences of indebtedness.

But defect of parties may ordinarily be remedied by an amendment of the bill in such a manner as to cure this defect, and thus avoid the effect of a demurrer for want of parties. This is the general or ordinary rule—the one usually observed by the courts. Indeed, a court ought not to dismiss a bill and deny relief where the only obstacle to the granting of relief is the want of essential parties, when the bill may be relieved from this objection by amendment.

This case, however, constitutes an exception to this rule. It must be clearly apparent that the relationship of the owners or holders of the certificates, to the suit, if brought into the case, must be that of plaintiffs; and as they are numerous, a few could join, suing on behalf of themselves, and all others similarly situated, and thus avoid the inconvenience of large numbers appearing on the record as plaintiffs in the suit. They would be the real plaintiffs, with the State of Virginia as a mere nominal party, thus creating a suit by individuals against a state of the Union, which is prohibited by the Constitution.

If an amendment were thus permitted so as to bring the Commission as the Trustee into this case as a party plaintiff, or this Commission together with the owners as co-plaintiffs with the State of Virginia, there would be presented a case in which the real parties in interest as individuals are the plaintiffs, in which a state with no interest and as a mere nominal party would be joined, thus allowing an individual to do by indirection associated with the state as a nominal party what he would be prohibited from doing in his own name. An evasion of this sort will not be permitted by the court, and the bill in this regard is not amendable, and the court on this consideration alone has no jurisdiction of that part of the bill seeking to establish the liability of West Virginia on these deferred certificates, and the extent of such liability.

If, however, the State of Virginia should ask to amend her bill by making the Commission as Trustee and holder of these certificates a party defendant, in order to give these owners and holders representation in the suit, if this could be done in the absence of the real parties in interest, then the court would have no jurisdiction under the principles laid down by this court in numerous cases which are cited and reviewed in the opinion announced in California *v.* Southern Pacific Co., 157 U. S. 229, 39 L. ed. 683. So, we perceive that as to this feature of the bill now under consideration, the court has no jurisdiction in any aspect of the case, nor can any amendment be made so as to give this court jurisdiction.

IV.

THE FACT THAT THE COMMISSIONERS OF THE SINKING FUND AND LITERARY FUND OF VIRGINIA HAVE IN THEIR POSSESSION COMPARATIVELY SMALL PORTIONS OF THE SAID CERTIFICATES ISSUED BY THE PLAINTIFF DOES NOT GIVE THE PLAINTIFF ANY CAUSE OF ACTION AGAINST THE DEFENDANT.

The commissioners of these two funds are mere state agencies or instrumentalities created by the Commonwealth of Virginia, to care for and preserve certain of her own financial resources, available for specific purposes, and which belong exclusively to Virginia. A few of the old bonds of Virginia issued prior to 1861 were by her converted into immediately available money by being deposited with these commissioners, and were therefore never sold and the title transferred from her so as to create a liability against the State herself, and hence at no time was there ever any right of action or liability on account of these old bonds so deposited with the said commissioners which could properly be asserted against the old state. In other words, these few old bonds deposited with these commissioners did not create any debt against the State of Virginia. At no time or under any circumstances could these bonds have been made or become a legitimate subject matter of controversy or suit against the Commonwealth of Virginia. To make them such, would present the grotesque spectacle of a sovereign state suing herself, for an accounting and payment to herself of her own funds, already under her absolute control.

Again there can be no liability in favor of the State of

Virginia against the State of West Virginia on these bonds so held. The moneys in the sinking fund which purchased these bonds previous to the first day of January, 1861, were raised by the revenues of the entire State before the division, and they were therefore the property of such entire State, and being in the ownership of the State itself, the debtor, they were a dead asset both as to that portion of the State which passed into the new State and the State of Virginia as she remained, and Virginia claiming to be such owner has no more right to institute and prosecute a suit thereon against West Virginia than would West Virginia if a similar bond had fallen into her possession. If there is any liability in respect to said bonds it is a liability of the State of Virginia to the State of West Virginia for a portion thereof.

Then if this were the status of Virginia as to the old bonds held by the commissioners of her Sinking Fund and Literary Fund, prior to 1861, and which remained unchanged at the time of the formation of the State of West Virginia, could their refunding and the issuance of the deferred certificates as to the one-third of them alter this status with reference to her right of suit thereon, or any part of them? The very propounding of the question must evoke a negative answer.

The idea of debt necessarily implies an obligation payable by the debtor to some third party—a creditor existing independently of the debtor, and over whom, as to the obligation asserted, the debtor can have no control, and in the use or disposition of which the debtor has no right or interest whatever.

How then—upon what principle—upon what ground or reason—can Virginia claim that the old bonds placed by her with her Commissioners of the Sinking and Literary Funds, were or are now any part of her *ante bellum debt?* We are wholly unable to perceive any. In fact, there is none.

If it be contended that the commissioners of the Sinking and Literary Funds are distinct entities from the State, persons clothed with an existence distinct and separate from the Commonwealth, with the right to assert a liability against Virginia on account of these old bonds acquired by them prior to the erection of the territory contained within the boundaries of West Virginia into a state, then and in that event this court cannot entertain jurisdiction of this suit, because these commissioners are necessary parties thereto, and the commission having been created and existing under and by virtue of the laws of Virginia, must be a citizen of Virginia, and if a distinct entity, it must necessarily be a corporation having its domicile in Virginia, where it was created.

Thus, we perceive that in any aspect of the case, the court has no jurisdiction of this suit so far as the certificates belonging to these commissioners are concerned. In fact, this feature itself of this cause constitutes no ground of controversy between the parties to the bill.

V.

THE CLAIM FOR PROPERTY TRANSFERRED BY THE PLAINTIFF TO THE DEFENDANT CONTAINED WITHIN THE BOUNDARIES OF THE TERRITORY OUT OF WHICH WEST VIRGINIA WAS ERECTED INTO AN INDEPENDENT STATE CREATES NO RIGHT OF ACTION ON THE PART OF VIRGINIA FOR THE VALUE OF THIS PROPERTY.

In February, 1863, the General Assembly of the State of Virginia passed the following Act, declaring:

> "That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the President and Directors of the Literary Fund, or the Board of Public Works thereof, or any person or persons for the use of this state, to the extent of the interest and estate of this State therein; and shall also include the interest of this state, or of the president and directors, or of the said board of public works, in any parent bank or branch doing business within the said boundaries and all stocks of any other company or corporation, the principal office and place of business whereof is located within the said boundaries, standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any other person or persons for the use of this state.

> "That if the appropriations and transfers of property, stocks and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state provided that no such property, stocks and credits shall have been obtained since the organization of the state government."

The bill of complaint relating to this property makes the following allegation:

> "Your oratrix is informed, believes, and so charges that the property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate, to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury, from the sale thereof, about six hundred thousand dollars, and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

It will be observed that all the property mentioned in this act was located within the territory comprised within the boundaries of West Virginia, and was designed for the use of the latter in the formation of a state government and in promoting the purposes of its establishment. The parent state parted with certain of her own territory and resources to create a new state within her own boundaries and to exercise over a part of her own people the powers of government, to be thereafter created by them, and to assume all the burdens and responsibilities incident to a state, and to erect for themselves all public institutions necessary to conduct the operations of the government of the new state, thus proposed to be created. Virginia in this act proposed new duties and

obligations for a part of her own citizens, and at the same time declared in her own halls of legislation what should be done by the new state which then had no existence, but which she, by her own act and that of the general government, designed to bring into existence, by parting with the very property which she intended should be used by the new government and a part of the people of Virginia would share in the benefits and advantages thus afforded.

Now can Virginia by her own act create an obligation to be assumed by a state not then in existence and which she by her own acts aids in creating? Can she, in this act, declare that a creature not then in being, shall account to her for property which she herself really bestows upon a part of her own citizens, and who, in the true sense of the term, are the real owners thereof, and when she has thus freely bestowed her own bounty upon her own citizens, make a demand thereafter upon the new government when it has been established, and that too when this new government is to extend to a large part of the citizens of Virginia full protection in the enjoyment of all their absolute and social rights? If so, upon what legal or moral principles can such a claim be predicated? The parent thus transfers all the burdens of her own government to a new state, created in her own boundaries, divesting herself of all responsibility for the conduct and safety of a large part of her former population and imposes upon another sovereignty these very obligations which she herself had borne, and that, too, by her own act, and now seeks indemnity and compensation from this sovereignty for performing a duty of which she herself has been relieved by her own act and concession.

By this act Virginia simply declared to a part of her own citizens that they could organize themselves into a government in a part of her own territory and thus become an independent state. These citizens of Virginia were the promotors and she co-operated with them to the end that a new state might be formed.

It will not be overlooked that the territory of Virginia was divided in 1863 while she retained her own identity and institutions, and out of the territory which she surrendered, and within it, a new state arose.

This is not the case wherein one state is treating with another, whereby one state cedes a part of her territory to be added to the domain of the latter. In such case she could stipulate the terms of the cession, which would constitute a compact between the two states enforceable as a binding obligation. Their attitude towards each other would be that of two independent and competent contracting parties.

Here the attitude of Virginia is very different. She, on the one side, proposes that a new state may be organized if the National Government will assent to its admission into the Union. She cannot propose conditions in advance of the creation of the new state, and enforce them against it as the price of property within its own territorial limits. This would constitute a mere *nudum pactum*. It would be without consideration because whatever is within the boundaries of the new state belongs to it, both upon reason and authority.

> "The new State on its part carries with it only local obligations, and whether contracted for local objects or secured by a lien on local revenues, and such local duties as arise out of agreements to maintain the channel of a river or to levy no more than certain tolls along its course. As a compensation for such burdens the new state is entitled to property within it of a local character, or to such, not within it, as belongs to state institutions localized there, and to the privileges arising from treaties specially contracted for the benefit of its territory, such for instance as contain demarcations of its boundaries, and such as secure to its inhabitants, or a part of them, the right to navigate streams running through other countries from its frontiers." Taylor, International Public Law, p. 204, citing Hall's Treaties on International Law (4th Ed., Oxford.) Sec. 27.

So if the new state is entitled to property within it of a local character, or to such not within it, as belongs to state institutions localized there, upon what principle can Virginia base a claim for the value of property within the territory of the new state of West Virginia? She cannot found it upon the doctrine of public international law. Neither can she found it upon an act of her own legislature, nor can she do so upon any act or agreement upon the part of West Virginia, for West Virginia did nothing, nor has she done anything to authorize it, as the new state was not a party to the agreement. Virginia has no claim and can have no claim for property, real or personal, localized or pertaining to or belonging to institutions localized in the territory out of which West Virginia was formed. She cannot base this claim upon treaty or compact, because at the time she declared by her own act of assembly that this property was to be taken by the new state when it came into being, there was no representative to act on behalf of the proposed new state so as to accept a cession of property upon terms proposed by the owner. This act of assembly could not be construed as a treaty between the state of Virginia and the proposed new state, as this was a mere *ex parte* act emanating from Virginia alone, and a treaty in its humblest and narrowest aspect, "is a mere agreement between states for the settlement of their current interests or controversies, made either with a tacit admission of the existence of the common law of nations, or with the express stipulation that some principle of that law shall be changed or modified in a particular case." Taylor, International Law, p. 93.

Hence the making of a treaty necessarily presupposes and assumes the presence and participation in its negotiations of two sovereign powers capable of acting. Another reason why it could not be referable to treaty is that one state cannot enter into a treaty with another state without the consent of Congress. In February, 1863, when this act of assembly was passed, upon which Virginia rests her claim

as presented by this feature of the bill, West Virginia had not been fully created and organized. Now, then, shall Virginia passing the title of property by her own act and imposing terms both unfair and unfounded upon the principles of public law, assert a claim to the value of this property when conditions have changed and the new sovereignty finds herself in possession of this property which is within her own territory, and actually necessary for the legitimate purposes of the new government? But it may be said or contended that if West Virginia is liable for her equitable portion of Virginia's public debt, is she not also liable for the public property of Virginia localized in the territory of the new state, or belonging to any of the public institutions localized there? This admits of a plain and satisfactory answer in the negative.

West Virginia's attitude as to the public debt of Virginia was provided for by the ordinance of Virginia and the constitution of West Virginia, and in the absence of such provision, it can scarcely be contended that the State of Virginia could assert any liability against the State of West Virginia as to any part of said debt.

Furthermore, there is nothing in the record to show that Virginia, either by her Act of Assembly or by any act on the part of her governor, has authorized any demand upon the state of West Virginia for compensation for property situated in the territory now comprising the State of West Virginia.

The bill sets up a further claim for property predicated upon the Act of the General Assembly of Virginia passed on the 4th day of February, 1863, and which, according to the bill, is in the following language:

> "1. That the sum of One Hundred and Fifty Thousand Dollars be and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the United States.

"2. That there shall be, and hereby is, appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated that may come into the treasury, up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of the State to make a statement of all the moneys that up to that time have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state."

After reciting this act the bill avers:

"And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid."

The same reasons and principles apply to this item demanded by Virginia from West Virginia, because of personal property located within the territory comprised within the State of West Virginia, that is applicable to the demand of a similar character made in the bill by reason of the Act already quoted passed by the General Assembly of Virginia on February 3, 1863.

It does seem to us that this claim of Virginia, which she rests upon the two acts passed by the General Assembly of February third and fourth respectively, in the year 1863, is not only without foundation upon any principles of law or equity, but is most unjust and unreasonable.

It is quite apparent that Virginia demands that West Virginia shall pay one-third of the old debt of Virginia upon

the sole ground that she parted with one-third of her territory, and therefore, on that ground alone, West Virginia should be made to bear that proportion of her *ante bellum* debt to the holders thereof, while Virginia should meet and discharge the other two-thirds of this obligation.

Has it occurred to the authorities of Virginia that when she parted voluntarily with one-third of her territory, she at the same time retained all of her institutions, or nearly so, intact, with the means in her own control of continuing the operations of her state government, while the territory she parted with had to be erected into a state government, all the institutions necessary to its operation to be constructed, and great expense incurred in order to bring the territory into the status of an independent state and put her machinery of government into operation? In this aspect of the case, Virginia cuts off about one-third of her domain, containing a large percentage of her citizenship, sets them adrift without the means of government, and now demands not only that the new government erected out of this territory shall bear the burden of one-third of her public debt, but also pay to her compensation for "all lands, buildings, roads, and other internal improvements, or part thereof, situated within said boundaries, and vested in this State (Virginia), or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this State (Virginia), to the extent of the interest and estate of this State (Virginia) therein," and all other property within the boundaries forming said new state, as well as all money properly belonging to the institutions of the state of Virginia localized in these boundaries.

On the other hand Virginia refuses to recognize any liability for the one-third of this debt on the very arbitrary basis assumed by her for its adjustment, still retains intact all property and institutions of every kind and character within her own domains, demanding compensation also for every article of property of any value with which she parted,

and that too by her own act of legislation. She cannot in equity and good conscience make this two-fold demand. She must forego her claim upon West Virginia for the liquidation of any part of her public debt, or she must concede to West Virginia the absolute ownership in all the property localized within her boundaries. But she cannot now deal with the one-third of her old debt, because she is practically released from any liability thereon by reason of the acts and course pursued by her with the creditors themselves. The only parties that are now asserting any demand against West Virginia as to the one-third of the old debt of Virginia are the creditors themselves—the true and legal owners and holders thereof. The right to look to West Virginia for the payment of this one-third, if the right exists anywhere, necessarily resides in the creditors, and not in the State of Virginia. She, therefore, has left the demand as to one-third of the debt against West Virginia, so far as she herself is concerned, in the hands of the creditors, and no act of hers can now affect their substantial rights. She cannot, therefore, do anything at this time to release West Virginia from any part of the demand which the creditors are asserting against her through the medium of this suit nominally instituted by Virginia.

She is therefore referred to the only alternative in *foro conscientiae aut legis*, and that is, a relinquishment of her own demand for compensation for property left by her within the boundaries of the territory out of which the state of West Virginia was created. She can only, therefore, stand upon that feature of her bill which relates to her old public debt, and as to this feature of the case, as we have already shown, she is without standing in a court of equity.

VI.

THE PLAINTIFF CANNOT ASSERT THE CLAIM WHICH SHE SETS FORTH IN HER BILL IN A COURT OF EQUITY.

In considering the proposition that the plaintiff cannot assert the demand contained in the bill in a court of equity, we must keep in mind the relation which Virginia bears to that part of her *ante bellum* public debt which is sought to be made the subject of controversy in this suit. She disclaims at this time all liability to her creditors on account of the so-called equitable proportion thereof which she insists shall be borne by the state of West Virginia, at the same time averring that she has adjusted and settled two-thirds of the original debt by agreement and contract between herself and its owners.

It is patent upon the face of the bill and its exhibits, as hereinbefore stated, that the prosecution of this suit by Virginia is solely in the interests of the owners and holders of the deferred certificates issued by Virginia herself without recourse upon her, and set apart as a liability of West Virginia to the holders of the old obligations, which have been surrendered to the state of Virginia and by her cancelled in accordance with her own acts of legislation.

She therefore cannot come into a court of equity to assert a right of contribution against West Virginia. There are two clear and cogent reasons for this:

(*a*) First, the decree which she seeks to obtain cannot inure to her benefit, but only to that of the holders of the deferred certificates.

(*b*) Second, she must have paid everything for which she and the new state were jointly liable so as to relieve the new state from all liability before she can seek contribution from her joint obligor.

That this is the principle upon which rests the equitable right of contribution is the recognized and well settled doctrine of the courts.

Springer *v.* Foster, 21 Ind. App. 15, 60 N. E. 720.
Kirkpatrick *v.* Murphy, 3 N. J. Law 506.
Grove *v.* O'Brien, 1 Md. 438.
Rooker *v.* Benson, 83 Ind. 250, 256.
Zook *v.* Clemmer, 44 Ind. 15.
Pegram *v.* Riley, 88 Ala. 399, 6 South. 753.
Screven *v.* Joiner, 1 Hill Ch. 252, 26 Am. Dec. 199.

The rule is universal that the party seeking contribution must have paid more than his share in order to maintain a suit for contribution.

9 Cyc. 699; 3 Am. & Eng. Dec. in Eq. 163.

The demand made by Virginia which she claims arises out of the acts of her General Assembly, passed February 3rd and 4th, respectively, in the year 1863, whereby she transferred certain real and personal property belonging to her to be used by the new state when created and organized, if it has any validity, which is not conceded here, is purely a legal demand and one which cannot be asserted under any circumstances in a court of equity.

If it be an equitable demand, upon what principle or doctrine of equity does it rest? It is not secured by any lien; it is not in the nature of a trust; it rests upon no equities to be asserted in order to enter a decree or to make the claim available. It is simply a money demand for the value of property which the plaintiff claims was used and appropriated by the defendant for which payment should be made.

This court has declared in Scott *v.* Neely, 140 U. S. 106, 117, 35 L. ed. 358, that,

> "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple

> contract, or as damages for injury to person or property, are legal actions and can be brought in the federal courts only on their law side."

This principle is based upon the seventh amendment to the Constitution of the United States, which declares that,

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In the federal courts this right cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in a legal action may be preserved intact.

Scott *v.* Neely, *supra*, in the opinion of the court.

Pursuing this provision of the organic law of the United States, the sixteenth section of the judiciary act of 1789, enacted that such suits "shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law;" and this prohibition is carried into the revised statutes of the United States.

Section 723.

This provision of the revised statutes "is simply declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any rights violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional

right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

Scott *v.* Neely, *supra*, citing Hipp *v.* Babin, 60 U. S. 19 How., 271, 278, 15 L. ed. 633, 635; Lewis *v.* Cox, 90 U. S. 466, 470, 23 L. ed. 70, 71; Killian *v.* Ebinghaus, 110 U. S. 568, 573, 28 L. ed. 246, 248; Buzard *v.* Houston, 119 U. S. 347, 351, 30 L. ed. 451, 453.

As already stated, the demand asserted by Virginia for money and property localized within the boundaries of West Virginia is simply for a debt predicated upon the transfer of property by Virginia and appropriated by West Virginia after her creation and organization as a state.

The demand made by the bill in this respect is for the money mentioned in the Act of February 4th, 1863, and the value of the property designated in the Act of February 3rd of the same year.

On the common law side of the court this demand may be made the subject of an action of debt, or even of an action of assumpsit on the implied promise, if any legal liability exists, which is not here conceded, on the part of West Virginia to repay Virginia the money which she used and to compensate her for the property appropriated and used, the amount of which would depend upon its value.

Therefore, the demand in the case now before the court is the alleged debt due the complainant for this property which in no respect differs from any debt upon contract; it is the subject of a legal action only in which the defendant is entitled to a jury trial in this court.

But it may be contended that there is no precedent for the trial of an action at law in this court, in which a jury may be empaneled as in ordinary trials in actions at law instituted in the Federal Circuit Court. It may also be contended that this is an exceptional case to be tried in a court exercising

exceptional original jurisdiction, and that therefore the ordinary distinction between law and equity ought not to be observed and followed. If there were no precedent for this, there is no assignable reason why such a precedent should not now be made.

But this court has already declared that it will not entertain a suit in equity brought by a state where an adequate remedy at law exists.

In Georgia *v.* Brailsford, the fourth case entered upon "the original docket" of the Supreme Court, a definition was first given of the original jurisdiction of this court. During the pendency in the circuit court for the district of Georgia between Brailsford and others and Spalding, to which the State of Georgia was not allowed to be made a party, this state, in February, 1792, filed its bill in equity in this court seeking the aid of its original jurisdiction for an injunction, in behalf of the state, to stay the payment to others of a certain debt in controversy in the said circuit court, which the State of Georgia claimed had been vested in her by the Act of Confiscation passed May 4, 1782.

The judges of the Supreme Court were divided in their opinion on the question of granting an injunction upon the ground that Georgia had a complete and adequate remedy at law.

Therefore, in 1793, a motion was made to dissolve the injunction and dismiss the bill, and upon this motion the following order was indicated by the chief justice: "The bill, however, was founded in the highest equity; and the ground of equity for granting the injunction continues the same, that the money ought to be kept for the party to whom it belongs. We shall therefore continue the injunction until the next term, when, however, if Georgia has not instituted her action at common law it will be dissolved."

Acting upon this statement of the court Georgia brought an action on the common law side of the original jurisdiction, perfecting her pleadings therein during February, 1794, a jury was empaneled for the trial of the case, and the

court charged the jury in effect that the act of the state of Georgia did not vest the title to the debt in the state at the time of its passage, and that by the terms of the act the debt was not confiscated but only sequestered, and the right of the obligees to recover it revived on the treaty of peace.

The record then recites that "the jury retired for a few minutes, and, on their return to the bar, by their foreman, Reynold Keen, say they find a verdict for the defendant."

Taylor, Jurisdiction and Procedure of the United State Supreme Court, pp. 52, 53.

Mr. Taylor, in his very estimable work just cited, considering the matter now under discussion, says:

> "No more emphatic assertion could have been made of the immemorial distinction between law and equity, or of the fact that the equity side of the original jurisdiction cannot be invoked when there is a plain and adequate remedy at law."
>
> *Idem,* 53.

This same distinguished author, quoting from Carson's History of the Supreme Court, page 169, note 7, further says:

> "It has been asserted that this is the only instance of trial by jury in the Supreme Court. This is an error. The minutes of the court disclose that in the case of Oswald *v.* New York, a jury was sworn and witnesses called, and a verdict found for the plaintiff of $5,315.06. This was in February, 1795. Two years and a half later a writ of enquiry of damages in the case of Catlin *v.* South Carolina was executed at the bar of the Supreme Court, and a verdict was given for plaintiff for $55,002.84. Although judgments were entered there is no record of any steps to enforce them."

At the time of the formation of the Constitution of the United States the distinctions existing between law and equity were well defined, and these distinctions were familiar to the framers of this instrument, and they considered it a

wise policy to carry them into the federal tribunals, and they have ever since been observed and enforced.

Therefore, Virginia's claim for a judgment against West Virginia for money and property located within the boundaries of the latter must be asserted at law.

It may be contended, however, that equity does have jurisdiction of that part of the bill which relates to the public debt of Virginia created prior to the formation of West Virginia, and that the court having jurisdiction of this feature of the case on equitable ground, which however is not conceded by West Virginia for the reasons hereinbefore stated, and though the other part of the demand may be legal in its nature, the court will entertain jurisdiction of the entire bill and grant full relief if the bill can be sustained upon any equitable ground whatsoever.

Be this as it may in some of the state courts, no such rule is observed in the federal courts.

It has long been a settled doctrine of the federal courts that legal and equitable claims cannot be blended together in the same suit.

In Scott *v.* Armstrong, 146 U. S. 499, 36 L. ed. 1059, the court, speaking through Mr. Chief Justice Fuller, in the course of its opinion says:

> "Section 914 of the Revised Statutes, in providing that the practice, pleadings and forms, and modes of proceeding in civil causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as, under the Constitution, matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted."

In support of this doctrine thus so clearly announced, the learned Chief Justice cites a number of decisions of this court, together with some decisions of the circuit courts.

The same principle is announced in Scott *v.* Neely, 140 U. S. 106, 35 L. ed. 358, and from this case we here quote points five and six of the syllabus as follows:

> "5. Remedies in federal courts at law or in equity, are not according to the practice of State courts, but according to the principles of the common law and equity.
>
> "6. A federal court has no jurisdiction of a suit in equity in which a claim, only cognizable at law, is united with a claim for equitable relief."

These principles have been fully adhered to in all of the federal courts, and are always applied in strict conformity to the well marked distinctions here laid down.

Now what is the status of the case at bar from any standpoint of its consideration? If it be conceded that the bill states a claim in equity relating to the *ante bellum* debt of Virginia, it cannot admit of argument that the claim for compensation for property used by West Virginia within the territory constituting her own boundaries formerly belonging to Virginia, is a pure legal demand, which has been united in the bill, and therefore the court will not entertain jurisdiction of this suit.

But we earnestly insist, upon reason and authority, that the plaintiff has no standing, even in a court of equity, with reference to that part of the bill relating to her public debt created prior to the formation of West Virginia; that as to this feature of the cause there is no ground for the assertion of any claim by the plaintiff against the defendant either at law or in equity; that this part of the bill is without merit, and that upon no consideration can this part of the plaintiff's claim be entertained by this court. This then leaves the naked legal claim of the plaintiff undisposed of, and the court being without jurisdiction in equity will not hear the cause as to this feature of the bill. The entire bill is without equity, and the demurrer interposed by the defendant ought to be sustained.

VII.

THIS COURT HAS NO JURISDICTION TO SETTLE OR DETERMINE THE PRINCIPLE UPON WHICH WEST VIRGINIA SHALL BE MADE LIABLE FOR ANY PORTION OF THE OLD DEBT OF VIRGINIA, BECAUSE THIS WAS MATTER OF CONTRACT BETWEEN VIRGINIA AND WEST VIRGINIA UPON THE ADMISSION OF THE LATTER INTO THE UNION.

The constitution of the new state, as prepared and formulated, looking to its admission into the union, contained the following provision as to the old debt of Virginia:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

On May 13th, 1862, the Legislature of Virginia passed an act entitled "An Act giving the consent of the Legislature of Virginia to the formation and erection of a new state within the jurisdiction of this state."

The first clause of said act is as follows:

> "*Be it enacted by the General Assembly*, That the consent of the Legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia to include the counties of Hancock, Brooke, * * * according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and

> the schedule thereto annexed proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861."

The third clause of said Act is as follows:

> "*Be it further enacted* that this Act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said Constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

It was thus provided by said Constitution that the Legislature should ascertain the same as soon as it was practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years; that is, it provided for the ascertainment of such equitable proportion by the Legislature of the State of West Virginia independently of the State of Virginia, and further made provision as to how the State of West Virginia should pay the same, and having provided that the Legislature of West Virginia itself should ascertain such equitable proportion, and Virginia having consented that it should ascertain such portion, it is respectfully submitted that neither Virginia nor any court can intervene and perform this legislative duty.

When West Virginia framed her constitution and inserted in it the provision concerning the public debt of Virginia created prior to 1861, and the State of Virginia through her Legislature accepted the Constitution of West Virginia as the basis of her consent, this created a compact between the two States and was absolutely binding both upon Virginia and West Virginia.

It is matter of history that the vote on the adoption of the Constitution of the new State was held on the first

Thursday in April, 1862; that this vote was taken and the Constitution ratified by the people; that the act of the Virginia Legislature was passed on the 13th of May, 1862, shortly after the vote on the adoption of the said Constitution was taken. This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of congress to the admission of the State of West Virginia into the Union. Accordingly on the 31st day of December, 1862, Congress acted on the matter, reciting the proceeding of the convention of West Virginia, and that of Virginia, and the act of the Legislature of the State of Virginia requesting that the new State should be admitted into the Union, and it then passed the act for the admission of said State.

These matters are fully recited in the opinion of this court delivered in the case of the Commonwealth of Virginia against the State of West Virginia, decided in 1870, and reported in 11 Wall. 39-65.

The action of the proposed new state in adopting her constitution by popular vote, the consent of Virginia through her Legislature given to the formation of the new State composed of the counties recited in the act giving her consent, and the deliberate consent of Congress, as required by the Constitution, consenting to the formation of the new State and admitting her into the Union, constitute a compact between Virginia and West Virginia, the terms of which, with reference to the said debt, form a part of this compact and are inviolable under the Constitution of the United States.

Biddle *v.* Green, 5 Wheat. 1, 5 Law. Ed. 547.

By this compact between Virginia and West Virginia, the former State referred to the Legislature of the latter the matter of ascertaining "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and therefore this "proportion" cannot be otherwise ascertained or determined than by the consent

of the State of West Virginia; nor can its liquidation be otherwise provided for than by a sinking fund sufficient in amount to pay the accruing interest and redeem the principal of whatever sum may thus be ascertained as the equitable proportion that West Virginia agreed to assume. Virginia referred this matter absolutely to the judgment of the Legislature of West Virginia and tacitly agreed to abide by the action of this legislative body.

This stipulation or compact between Virginia and West Virginia, with reference to the public debt of the former, is a valid and binding contract, and Virginia can do nothing, either by legislation or otherwise, to impair its obligation. West Virginia has the undoubted moral and legal right to stand upon its terms; and if in the exercise of its judgment exercised upon a basis just and equitable, it should be ascertained by the Legislature of West Virginia that the State owes nothing to the bondholders of the old debt of Virginia, then there is no obligation whatever subsisting which can be enforced by the holders of any part of the old debt of Virginia, and especially has Virginia herself no cause of action against this State.

VIII.

THE EFFECT OF THE COMPACT BETWEEN VIRGINIA AND WEST VIRGINIA ARISING FROM THE ADMISSION OF THE LATTER INTO THE UNION AS A STATE UPON THE CLAIM OF VIRGINIA TO PROPERTY LOCALIZED OR PERTAINING TO INSTITUTIONS LOCALIZED WITHIN THE BOUNDARIES OF WEST VIRGINIA.

We have already presented to the court our considerations relating to this feature of the case upon grounds independently of that which is here presented, and have shown that Virginia cannot sustain this part of her claim in this suit. It seems to us, however, that there is a further and conclusive reason why this part of her demand is without foundation.

In the initiatory convention held by Virginia on the 20th of August, 1861, having as one of its objects the consideration of the matter of the formation of a new State out of a part of the territory within her then existing boundaries, the representatives in that convention did not consider any condition touching the formation of a new State other than the one that the new state should take upon itself the payment of "a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and this was made the ultimate condition as expressed in the Constitution of West Virginia ratified by popular vote in April, 1862. This condition was, with some modification in the language employed to express it, inserted in the Constitution which West Virginia adopted. And Virginia, in May, 1862, signified her consent through her Legislature that the new state should be formed with the consti-

tution which she had theretofore in April, 1862, adopted as her organic law, and with no other or additional burdens or liabilities touching the new state soon to be brought into existence, and needing only therefor the consent of Congress which was given in December, 1862.

When Virginia had given her consent properly expressed, as was done in this case, she could not revoke it, and the only other body whose action was essential to the creation of a new state that could impose other or further conditions touching her admission into the Union, was the Congress of the United States. Congress did give her consent in December, 1862, and it only remained for West Virginia to provide against slavery within her boundaries, and when this measure was adopted in the manner provided by the act of admission, West Virginia then became an independent and sovereign State of the Union.

After Virginia gave her consent to the formation of West Virginia in May, 1862, and the act of Congress was passed in December of the same year, providing for her admission as a state, all property localized in West Virginia, or belonging or appertaining to institutions localized there, passed to and became absolutely the property of West Virginia.

Therefore the acts of the Legislature of Virginia subsequently passed on the 3rd and 4th days of February, 1863, respectively, seeking to create a liability against West Virginia by an *ex parte* act, are without any force or effect to create any debt against West Virginia because of the matters in any of them to which the acts respectively relate. All of the property formerly belonging to Virginia located within the boundaries of West Virginia became and constituted a part of her public domain, and over which her territorial sovereignty extended as fully and efficiently as if no part of this property had ever belonged to the old state.

This necessarily results from the relation of the states to each other and to the general government. If it were otherwise and the property and sovereign interests belonging to

West Virginia, after her admission as a state into the Union, could be made the subject of disposal through a legislative act of Virginia efficient for the purpose for which such act was passed, then it would be within the sole power of Virginia to annihilate, by her own acts, all the instrumentalities and means necessary to uphold the integrity of West Virginia as a state. It would defeat her own avowed purpose as well as that of the national government.

Furthermore, if force and effect be given to these acts of legislation passed by the General Assembly of Virginia in February, 1863, it would necessarily impair the obligation of a contract existing between Virginia and West Virginia growing out of the terms of admission of the latter as a State into the Union. Because the only liability which she in any wise agreed to assume, and thereby did assume, was an "equitable proportion" of the public debt of Virginia.

It is now respectfully submitted that the State of Virginia has no claim against West Virginia with reference to her public debt, nor any valid demand against her for property localized within the boundaries of West Virginia; that it clearly appears upon the face of the bill that it is without equities to support it; and therefore the demurrer filed by the State of West Virginia ought to be sustained, and the plaintiff's bill dismissed.

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COMMONWEALTH OF VIRGINIA

v.

STATE OF WEST VIRGINIA.

BRIEF ON DEMURRER.

J. G. CARLISLE,
For West Virginia.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original, No. 7.

COMMONWEALTH OF VIRGINIA

v.

STATE OF WEST VIRGINIA.

BRIEF ON DEMURRER.

The bill in this case sets up at least two separate and distinct causes of action, one in behalf of Virginia in her own right to have an accounting with the State of West Virginia for the value of certain property and money alleged to have been transferred to and received by the defendant State under two acts passed by the legislature of Virginia on the 3d of February, 1863, and the 4th of February, 1863; and the other in the name of Virginia as trustee, suing for the use and benefit of the owners of certain certificates set out and described in the bill and exhibits.

The first act under which it is alleged property was transferred provided as follows:

> "That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the prop-

> erty of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof situated within said boundaries, and vested in this State, or in the president and directors of the Literary Fund, or the board of public works thereof, or in any person or persons for the use of this State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State."

And by the fifth section it was enacted:

> "That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government."

It is then charged in the bill that the property which was transferred to the State of West Virginia under this act was received and enjoyed by that State, and consisted of a number of items the value of which amounted in the aggregate to "several millions of dollars," the bank stocks alone having realized to the State about "six hundred thousand dollars."

(R., pp. 4, 5.)

The second act is as follows:

> "1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.
>
> "2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; *Provided, however,* That when the said States of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."
>
> (R., pp. 5, 6.)

It is alleged that the sum of one hundred and fifty thousand dollars, "together with other sums belonging to the State of Virginia," were received or collected by the State of West Virginia after its formation.

Again it is alleged that:

> "The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia."
>
> (R., p. 10.)

It is alleged in the bill that on the 20th day of August, 1861, the Commonwealth of Virginia, in convention assembled, at the city of Wheeling, adopted an ordinance "to provide for the formation of a new State out of the portion of the territory of this State," and that the ninth section of the ordinance was as follows:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."
>
> (R., p. 4.)

It is then alleged that the new State was admitted into the Union on the 20th day of June, 1863, under a constitution which contained the following provisions:

> "5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."
>
> "7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.
>
> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and

> the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."
>
> (R., p. 6.)

It is shown by the bill that the State of Virginia has settled with the holders of the old public debt by issuing new bonds for two-thirds of the principal and interest, which was decided by the State herself to be her equitable proportion of the debt, and issuing certificates for the other one-third which was assumed by the State of Virginia and by her creditors to be the proportion for which West Virginia was liable, and it is stated that—

> "By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, *in trust*, for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her."
>
> (R., p. 8.)

And it is also alleged that—

> "All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent. of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto."
>
> (R., p. 9.)

It is averred in paragraph one of the bill that on the 1st day of January, 1861, the State was indebted "in about the sum of $33,000,000," and that in addition to this "there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the commissioners of the sinking fund and the literary fund of the State," the former amounting to $1,462,993.00 and the latter to $1,543,669.05, as of the same date.

(R., p. 1.)

The several acts of the legislature under which the debt was adjusted and the contracts under which the certificates issued by the State have been deposited with a commission, *in trust* for the purpose of bringing this suit, are exhibited with and made part of the bill, and it is alleged that "this suit has been instituted at the request and direction of the said commission and in strict conformity with the provisions of the said act of March 6, 1900," which act will be hereafter referred to in this brief.

In the preamble to the act of March 30, 1871, which was the first one passed by Virginia to provide for the funding and payment of two-thirds of the debt, it was recited, among other things, that—

> "Whereas it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof *and not to this State, as the constitution of this State provides;* now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore be it enacted," etc., etc.
>
> (R., pp. 13, 14.)

The third section provided that—

> "Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, *in trust* for the holder or his assigns."
>
> (R., p. 15.)

It appears from one of the exhibits attached to and made part of the bill that the certificates issued to the creditors under the provisions of this act were as follows:

> "This is to certify that there is due unto —— —— — heirs, executors, administrators or assigns $—, being one-third of bond surrendered under the provisions of an act approved March 30th, 1871, entitled, 'An act to provide for the funding and payment of the public debt,' namely, bond No. —, with interest, amounting to $—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded *in trust* for the holder hereof or his assigns."
>
> (R., pp. 47, 48.)

The fourth section provides, among other things, that—

> "The treasurer shall, by proper endorsement, written or stamped, upon each bond, certificate of stock, or interest certificate so surrendered and delivered to him, *cancel the same,* and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law."

This act provided for funding two-thirds of the public debt and interest in bonds bearing interest at the rate of 6 per cent.; but subsequently, on March 28, 1879, another act, prescribing a plan of settlement, was passed, which provided for the issue of twenty-year bonds bearing interest at the rate of 4 per cent. and ten-year bonds bearing interest at the rate of 5 per cent.

The sixth section of that act provided that—

> "The rules prescribed under the act approved March thirtieth, eighteen hundred and seventy-one, in respect to preparing, signing and issuing the new bonds and coupons, regulating the same, and in taking in, *cancelling* and registering the old bonds, shall be observed by the officers of the treasury in the execution of this act, except so far as the same be modified by the provisions of this act. * * * But in *cancelling* and registering the bonds as above directed, in every bond and coupon surrendered under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so *cancelled* shall be filed for reference."
>
> (R., pp. 18, 19.)

And in the seventh section of that act it is provided that—

> "The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and

payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange; and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held *as a full and absolute release of the State of Virginia from all liability on account of said certificates.*"

February 14, 1882, another act was passed entitled "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory, resources," etc., etc. This act again provided for refunding only two-thirds of the old debt and interest at 3 per cent., and it was enacted that—

> "For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:
>
> "No. —.
>
> "The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for — dollars, held by —— ——, dated the — day of ——, and numbered —, leaving a balance of — dollars, with interest from —— —, to be accounted for by the State of West Virginia, *without recourse upon this commonwealth.*"

In section 8 it was provided that—

> "All the bonds and certificates of debt and evidences of past-due and unpaid interest taken in under the provisions of this act, shall be *canceled* by the

> treasurer in the presence of the board of the commissioners of the sinking fund as the same are required (acquired), and by the treasurer the same shall be carefully preserved until such time as the General Assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so canceled, from time to time, shall be certified by said board and filed with the treasurer for preservation."
>
> (R., p. 29.)

This act also provided that after its passage "no bonds, certificates, or other evidences of indebtedness, shall be issued for any portion of the debt of this State, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided."

(R., p. 30.)

February 20, 1892, an act was passed to refund at least $23,000,000 of the outstanding debt which had not been presented in exchange for new bonds under the act of February 14, 1882. Like the others, this act provided for only two-thirds of the principal and interest of the debt, then outstanding, and by the sixth section it was enacted that—

> "For all balances of indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the Commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:
>
> "No. —.
>
> "The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for — dollars, dated — day of ——, and No. —, leaving a balance of — dollars, with interest from —— —, to be accounted for to the holder of this certificate by the

State of West Virginia, *without recourse upon this Commonwealth.*"

(R., p. 35.)

In the ninth section it was provided that—

"All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be *cancelled* by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the General Assembly; a schedule of the bonds, certificates, and other evidences of debt so cancelled shall be certified by said commissioners and filed by the treasurer for preservation."

(R., p. 37.)

In the tenth section it is enacted, among other things, that—

"All bonds of the State issued under the provisions of the act aforesaid, approved February fourteenth, eighteen hundred and eighty-two, and now held by said commissioners of the sinking fund, shall, as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act, be *cancelled* by said commissioners and preserved in the office of the treasurer of the Commonwealth."

(R., p. 37.)

March 6, 1894, the legislature of Virginia passed a joint resolution, the preamble to which, after reciting the titles of the acts to which we have heretofore referred, declared:

"Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: one-third of the amount of said obligations, of which certificates this State holds a large amount,

through the agency of the commissioners of its sinking and literary fund; and

"Whereas the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original State; now, therefore, be it resolved," etc.

(R., p. 40.)

This resolution provided for the appointment of a commission of seven members, which was—

"authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia.

"But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. *But said commission shall in no event enter into any negotiation thereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof.*

"All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement, or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the State to any expense on this account. And their action shall be subject to the approval or disapproval of the General Assembly, and shall not be binding on the State untill approved by the General Assembly. The governor is requested to communicate this joint resolu-

tion to the governor and legislature of West Virginia."

(R., pp. 40, 41.)

Commissioners were appointed under this resolution, but, no adjustment having been made, the act of March 6, 1900, was passed, entitled—

> "An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises."

The preamble to the act, after reciting the titles of acts previously passed, is as follows:

> "Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: one-third of the amount of said obligations, of which certificate this State holds a large amount, through the agency of the commissioners of its sinking fund, and
>
> "Whereas the General Assembly is required by the constitution of Virginia to provide by law for adjusting with the State of West Virginia the proportion of the debt of the original State of Virginia proper to be borne by West Virginia, but no such adjustment has ever been had; and
>
> "Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt *which she assumed*, yet it is possible that complications will arise with respect to said certificate which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now therefore, be it enacted," etc.

The first section provided—

> "That the commission created and appointed under a joint resolution of this General Assembly entitled a joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby is, authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited *will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder.*"
>
> (R., p. 42.)

The second section provided that—

> "If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the State through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings, on behalf of the State, as may in the judgment of said commission and attorney-general be needful and proper to protect the interest of the State and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate

holders, as provided in the joint resolution aforesaid, and the State shall not be subject to any expense on that account."

(R., p. 42.)

The holders of a large amount of certificates issued by Virginia for what she claimed was West Virginia's just proportion of the debt, had deposited their certificates with a committee for collection or adjustment, and on the 20th of July, 1898, the depositing committee, through its chairman, made the following proposition to the Virginia commission:

"Whereas your commission was constituted as set forth in said joint resolution and act of assembly for the purpose of negotiating and bringing about a settlement with the State of West Virginia with respect to the proposition of the public debt of the original State of Virginia proper to be borne by West Virginia and in connection with which the present State of Virginia has issued certain certificates under four acts of its General Assembly, approved, respectively March 30th, 1871, March 28th, 1879, February 14th, 1882, and February 20th, 1892.

"And whereas your commission was, under the said act of March 6, 1900, further authorized to receive and take upon deposit the certificates aforesaid, or to have the same otherwise placed or held on deposit subject to your control, upon the agreement and contract on the part of the holders of said certificates that if your commission would secure a settlement with West Virginia with respect to said certificates, the said holders of said certificates, so deposited, would accept the amount realized on such settlement from West Virginia as a full settlement of all their claims thereunder; and said act further provided that if at least two-thirds of the amount of the said certificates issued under said act of 1871, (exclusive of those held by the State through the agency of the board of education and the sinking fund commissioners) and at least a majority in amount of all the other certificates should be so deposited or placed subject to the control

of your commission upon the agreement and contract aforesaid, then your commission should be authorized, by and with the approval of the attorney-general of Virginia, to take action in the premises as might be needful to protect the interests of the State and bring about and carry into effect a settlement as aforesaid.

"And whereas by a certain agreement of July 28th, 1898, a committee on behalf of the holders of the said certificates was constituted to bring about the deposit, as far as practicable of said certificates in such depository as the committee should appoint with powers in the committee to act as agent of the certificate holders so depositing in bringing about a settlement of their claims upon such plan, as might be recommended by the advisory board named in said agreement and as should become effective thereunder; it being further stated in said agreement that all the said certificates so deposited would be promptly surrendered in exchange for whatever amount West Virginia might agree to pay and the creditors of West Virginia might agree to accept as aforesaid.

"And whereas more than two-thirds in amount of all the said certificates of 1871, outstanding as aforesaid, to wit, $8,565,095.70 and a majority of all the other certificates aforesaid, to wit, $1,782,475.13, have been duly deposited with said committee and are in custody of Brown Brothers & Company, bankers of New York city, N. Y., the depository named by said committee, and are held subject to the control of the said committee under the said agreement, so that the same can be duly placed and held subject to the control of your commission in accordance with the said agreement and in pursuance of such plan of settlement as is now proposed or as may hereafter become effective.

"In view of the premises the undersigned, the committee aforesaid, do now hereby tender and place subject to the control of your commission all the aforesaid certificates, so held on deposit, upon the agreement and arrangement on the part of your commission, acting for the State of Virginia under the said joint resolution and act of assembly aforesaid, that your commission will enter into negotiations

with the State of West Virginia or the constituted authorities thereof for the purpose of effecting a settlement with West Virginia with respect—the said certificates in accordance with the said agreement of July 28th, 1898, and in accordance with such plan of settlement as is now proposed or as may hereafter become effective; and that your commission will by and with the advice and approval of the said attorney-general take such action as they may deem needful in the premises; and in event such a settlement is so made, then it is hereby agreed that the amount realized thereon *shall be accepted in full satisfaction of all the claims of the certificate holders thereunder* and the undersigned committee will surrender to your commission, in exchange for such amount the certificates aforesaid so deposited.

"If this proposal be accepted by your commission, the same shall constitute an arrangement and contract with the State of Virginia for obtaining a settlement with West Virginia and the same shall continue binding upon the undersigned committee and upon the holders of said certificates so deposited for the period of three years next ensuing from the date hereof for the purpose of allowing time for a settlement aforesaid; and the same shall be subject to renewal and extension for such further time as may be agreed upon and to such modification and amendment as may be agreed upon, and shall apply to and include any and all such certificates as aforesaid as may hereafter be deposited with and held by the said committee under said agreement of July 28th, 1898."

(R., pp. 54-56.)

This proposition was accepted by the Virginia commission, with the approval of the attorney-general, on the 18th of September, 1902.

On the 3d of December, 1902, the advisory board of the depositing committee promulgated the following plan of settlement, which was approved by the committee:

"Under an agreement of July, 1898, a committee was constituted for the purpose of assembling the Virginia deferred certificates, with certain powers and functions as in the agreement specified, and by the

same agreement an advisory board was constituted whose functions were also specified in the agreement.

"In pursuance of this agreement, a certain plan of settlement was, on the 21st day of June, 1899, formulated and recommended by the committee and advisory board, which among other things, contained the following provision:

"'The committee may surrender to either State (Virginia or West Virginia) any of the deposited certificates and receive in full satisfaction therefor their *pro rata* of such an amount in State bonds, or cash as may be agreed upon between the committee and the representatives of Virginia or West Virginia, as the maximum amount which West Virginia will assume on account of her proportion of the debt of the original State.'

"Since the date last named the General Assembly of Virginia, on the 6th day of March, 1900, passed an act authorizing a commission which had been appointed and constituted on her behalf in the premises, by and with the advice and approval of her attorney-general, to take such action and institute such proceedings as might, in the judgment of the commission and attorney-general, be needful and proper to bring about and carry into effect a settlement of said certificates; but it was further provided in this act that such action should be taken only in the event that at least two-thirds of all the certificates of 1871 (exclusive of those held by the State) and a majority of all the other certificates, should be deposited with or placed subject to the control of the commission upon an agreement on the part of the holders of such certificates that if the commission would secure a settlement with West Virginia with respect to said certificates, *they would accept the amount realized from West Virginia on such settlement in full of all their claims thereunder.*

"On the 18th of September, 1902, the committee held on deposit $8,565,095.70 of the certificates of 1871, being more than two-thirds thereof (*) as

(*) On March 2nd the figures were $9,231,602.13 of the certificates of 1871 and $2,239,451.62 of all the other certificates.

above stated, and $1,782,457.13 of all the other certificates, being a majority thereof; and the committee accordingly on that day entered into a contract with the Virginia commission, by which it was stipulated that the said certificates should, for the period of three years, be held subject to the control of the commission upon the agreement and arrangement on the part of the commission that they would enter into negotiations with the State of West Virginia for the purpose of effecting a settlement with respect to said certificates, and would by and with the advice and approval of said attorney-general, take such action as they might deem needful in the premises; *the amount realized on such settlement to be accepted in full of said certificates* as above stated, which contract was duly approved by the attorney-general of Virginia on September 29th, 1902.

"In view of this act of the Virginia assembly, and of the recent action taken thereunder, it is deemed desirable to make the plan of settlement heretofore recommended more definite with respect to the matters now involved; and to this end the following is hereby formulated, approved and recommended by the committee and the advisory board by way of supplement and addition to the original plan:

"I. The above named committee shall pledge or deposit the certificates now or hereafter received under the agreement of July 28, 1898, with the Virginia commission, in conformity with the act of March 6, 1900, *for the purpose of taking such action and instituting such proceedings, by and with the advice and approval of the attorney-general of Virginia as may be deemed needful to bring about and carry into effect a settlement as in said Act provided;* such pledge or deposit to be for such length of time as may be agreed on; and the said agreement of September 18, 1902, shall continue in force for the period therein specified; and the committee may enter into such further agreements with the said commission as may be deemed needful to bring about a settlement in the premises.

"II. In the event that no settlement shall be effected by the Virginia commission either under the

agreement of September 18, 1902, within the period therein specified, or under any other agreement which may be entered into between the committee and the said commission within such time as may be limited therein, the committee may, after any and all such agreements with the said commission shall have expired, take such other and further proceedings and make such other and further agreements and settlement in the premises as the committee may deem judicious.

"III. The committee shall be authorized to make such disposition by pledge, sale or otherwise, of the certificates, now or hereafter deposited, under the agreement of July 28, 1898, as may be necessary to carry into effect any proceedings taken and any agreements or settlements made by them as above stated, with or through the said commission or otherwise, or for the payment of expenses now or hereafter to be incurred, whether a settlement is effected or not, not to exceed, however, the limit fixed by said agreement, and may give such release and acquittance as may be necessary to that end.

"The amount realized on or the proceeds of any such settlement, after deducting proper charges under the agreement of July 28, 1898, shall be apportioned and distributed among the different certificate holders in such manner and according to such percentages as may be ascertained and established for the different classes of certificates by a tribunal to be constituted as follows; one member thereof to be appointed by the committee, one member by the advisory board, and the third by the two so appointed; and if it be impracticable in the judgment of such tribunal to distribute in kind any bonds or securities which may be received in any such settlement, then the same may be sold and converted into money for the purposes of such distribution. If a vacancy occur in such tribunal the same shall be filled by the remaining members.

"New York, December 3d, 1902."

This agreement was signed by the members of the advisory board and the chairman of the committee.

On the 14th day of December, 1904, an additional agreement was made between the depositing committee and the Virginia commission, which was extended indefinitely as to time by contracts made September 9, 1905 and November 24, 1905. The said contracts are as follows:

"Memorandum of agreement, made this 14th day of December, 1904, between the depositing committee of the securities known as the Virginia deferred certificates as constituted under the contract of July 28th, 1898, and of which John Crosby Brown is chairman, and Robert L. Harrison, secretary, acting under the plan of settlement approved on December 3rd, 1902, by the advisory board referred to in the said contract, hereinafter referred to as the depositing committee, party of the first part, and the commission constituted on behalf of the State of Virginia for the purpose of bringing about a settlement with the State of West Virginia with respect to said certificates as constituted and acting under the joint resolution of the General Assembly of the State of Virginia, approved March 6, 1894, and the act of said General Assembly, approved March 6, 1900, and of which John B. Moon is chairman, and Joseph Button is secretary hereinafter referred to as the Virginia commission, party of the second part:

"Whereas, by an agreement entered into between the above parties on the 18th day of September, 1902, certain of the certificates aforesaid amounting in the aggregate to $10,347,570.85 were tendered by the depositing committee aforesaid to the said Virginia commission, and were placed subject to the control of the said commission upon the agreement and arrangement on the part of the said commission acting for the State of Virginia under the said joint resolution and act of assembly aforesaid, that the said commission should enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting with West Virginia a settlement with respect to the said certificates, *in accordance with the said contract of July 28th, 1898*, and in accordance with such plan of settlement as was then proposed or might thereafter become

effective, and that the said commission would, by and with the advice and approval of the attorney-general of Virginia, take such action as they might deem needful in the premises; and that in the event such a settlement was so made, then it was *agreed that the amount realized thereon should be accepted in full satisfaction of all the claims of the certificate-holders thereunder*, and that the said committee would surrender to the said commission, in exchange for such amount, the certificates so placed subject to the control of said commission. And it was further specified in the said agreement of September 18, 1902, that the same should apply to and include all such certificates as might thereafter be deposited with and held by the said committee under the said contract of July 28, 1898, and that the said agreement should constitute an arrangement and contract between the said committee acting for the said certificate-holders with the State of Virginia for obtaining a settlement with West Virginia, and that the same should continue binding upon the parties and upon the holders of the certificates so deposited for the three years next ensuing from the date of the said agreement; that is to say, until the 18th day of September, 1905. And the said agreement further provided that the same should be subject to renewal and extension for such further time as might be agreed upon between the parties and to such modification and amendment as might thereafter be agreed upon; and

"Whereas, the said agreement of September 18, 1902, was approved by the Hon. William A. Anderson, attorney-general of Virginia, by his endorsement at the foot thereof on the 29th day of September, 1902; and

"Whereas, the provisions of the said agreement last named were fully approved and recommended on the 3rd day of December, 1902, by the advisory board referred to in the said contract of July 28, 1898, as appears by the plan of settlement made and approved by the said committee and the advisory board and bearing date December 3rd, 1902, of which plan of settlement publication was duly made as provided in the said contract of July 28, 1898, and no notifica-

tion whatsoever was given to the said committee, either directly or through any depository, by any of the holders of the deposited certificates, of their unwillingness to accept the proposed settlement as set forth in the said plan so published and more than thirty days having elapsed after the said publication was completed, and the said plan of settlement having therefore become complete; and of this fact the declaration in writing of the committee having been duly made to the only depository under the said contract, to wit, Messrs. Brown Brothers & Company, of 29 Wall street, New York, the said plan of settlement thereupon became effective and final; and

"Whereas, it is now proposed under the terms of the said agreement of September 18, 1902, and by way of modification thereof as therein provided, to place more fully and completely under the control of the said Virginia Commission all the certificates aforesaid which had up to that date been deposited, and also all thereafter deposited so that the said Virginia commission may be given full and complete control of all the said certificates in their proposed negotiations with the State of West Virginia, and also in any action and proceeding which may be taken or instituted by the said Virginia Commission by and with the advice and approval of the said attorney-general under the said act of the General Assembly of Virginia March 6, 1900:

"Now therefore this agreement witnesseth: that the aforesaid depositing committee does hereby authorize and direct their said depository Messrs. Brown Brothers & Company to issue to the Virginia Debt Commission a certificate that all the aforesaid Virginia deferred certificates which have up to this time been deposited with the said Brown Brothers and Company under the said depositing agreement of July 28, 1898, and all which may hereafter and before the 18th day of September, 1905, be so deposited with the said depository are held by the said depository on deposit for and subject in all respects to the control and disposition of the said Virginia Commission *in pursuance of the said joint resolution and act of the General Assembly of Virginia;* and to this

end the said Messrs. Brown Brothers & Company are authorized and instructed to issue such certificate to the said Virginia Commission in such form as to show that all of the certificates aforesaid have been received and are held by them on deposit for the said Virginia Commission and subject to the control and disposal of the said commission:

"But this agreement shall continue in force only until the said 18 day of September, 1905, when the said certificate issued by the said Brown Brothers and Company to the said Virginia commission for the purpose of making a settlement with West Virginia as aforesaid shall be returned to the said depositing committee, unless a settlement shall have been before that time negotiated with West Virginia in pursuance of said contract of September 18th, 1902, or unless negotiations be then pending with the properly constituted authorities of West Virginia for such settlement upon some equitable basis which has been agreed to by said commission and the authorities of West Virginia aforesaid. *Provided, however*, That it is fully understood and agreed that the time for continuing in force this agreement may be extended by the consent and agreement of the parties hereto indorsed hereon or at the foot hereof, for such length of time and upon such conditions as the parties may hereafter specify; and this agreement may be changed, modified and amended with respect to the action and proceedings to be taken or instituted by the said commission in the premises, as may hereafter be agreed upon by the parties and then indorsed as aforesaid, or as may be specified in a further and supplemental agreement between the parties.

"In testimony whereof the signatures of the chairman of the said depositing committee and of the Virginia Commission, attested by the respective secretaries thereof, are hereunto affixed on the day and year first above written.

"JOHN CROSBY BROWN, *Chairman.*

"ROBERT L. HARRISON, *Secretary.*

"JOHN B. MOON,
"Chairman of Virginia Commission.

"JOSEPH BUTTON, *Secretary.*"

"The foregoing agreement is hereby approved as having been entered into by my advice and approval.

"WILLIAM A. ANDERSON,
"Attorney-General of Virginia.

"Dated December 14, 1904."

"The foregoing agreement of December 14th, 1904, together with the contract of September 18th, 1902, therein referred to, are hereby extended in all their provisions until December 1st, 1905, and they shall remain in full force until that date just as if December 1st, 1905, instead of September 18th, 1905, had been the date originally named therein for their limitation, with the right of extension, enlargement and modification on or before December 1st, 1905, in all respects as therein specified.

"Given under our hands this 9th day of September, 1905.

"JOHN CROSBY BROWN,
"Chairman Depositing Committee.

"ROBT. L. HARRISON, *Secretary.*

"JOHN B. MOON,
"Chairman Virginia Commission.

"JOS. BUTTON, *Secretary.*"

"The above extension of the contracts above referred to is hereby approved this 9th day of September, 1905.

"WILLIAM A. ANDERSON,
"Attorney General of Virginia."

"Upon the execution of the foregoing contract of December 14, 1904, hereto annexed, Messrs. Brown Bros. & Co., bankers of New York, N. Y., the depository referred to in said contract, issued to the Virginia Commission therein named the certificate provided for in said contract, which was also in the form of a receipt and showed that Virginia deferred certificates of 1871 to the amount of $10,639,776.42 and certificates of other dates to the amount of $2,270,779.47 were held by said Brown Bros. & Co. on deposit for

and subject to the control and disposal of said commission; thus placing subject to the complete control and disposal of the commission considerably more than two-thirds of the total of $12,703,451.79 of the certificates of 1871 outstanding and in the hands of the public, and a large mapority of the total of $2,778,239.80 of the other certificates so outstanding.

"Thereafter, in January and February, 1905, the Virginia Commission, through its properly constituted sub-committee acting with the attorney-general of Virginia, made to the governor and attorney-general of West Virginia, and to the finance committees of the legislature of that State, which was then in session, a full statement and presentation of the matters outstanding and unsettled between the two States in connection with the deferred certificates aforesaid, accompanied by an urgent plea on behalf of the State of Virginia that the legislature of West Virginia would, at least, appoint a committee or other public functionary with authority to take up the questions involved for the purposes of discussion and negotiation, but the commission was again met, as it had been in a previous attempt to open negotiations on the subject, by an absolute refusal on the part of the authorities of West Virginia to treat on the subject at all; thus leaving to the Virginia Commission and attorney-general of that State no possible means of bringing about the settlement, which they are charged with the responsibility of making, except by a resort to the court having jurisdiction of controversies between States.

"Now, therefore, it is hereby stipulated and agreed by and between the depositing committee, named as the party of the first part in the said foregoing contract of December 14th, 1904, and the Virginia Commission therein named as the party of the second part, the said commission acting in this behalf by and with the advice and approval of the attorney-general of Virginia, that in accordance with the provisions contained in the said foregoing contract and addendum thereto of September 9th, 1905, the same is hereby amended, modified and extended as follows, to wit:

"1st. Neither the said foregoing contract of Decem-

ber 14th, 1904, nor the contract therein referred to between the same parties, bearing date September 18th, 1902, shall expire on the 1st day of December, 1905, but the same shall continue in force in all respects just as if no time limit had been named in either of said contracts, and this agreement shall be taken as a continuation, modification and extension of said contracts.

"2nd. The certificaie or certificates heretofore given by Brown Bros. & Co., the depository of the said committee, to the said Virginia Commission, covering the deferred certificates aforesaid, shall be retained by the said commission and shall remain in full force and effect without regard to time limit; and the said Brown Bros. & Co. shall issue and give to the said commission such other and further certificates and receipts in the premises, by way of amendment or in lieu of those already given or otherwise, as may be deemed needful or desirable in order to place said deferred certificates more completely and finally under the control and at the disposal of the said commission for the purpose of carrying out this agreement; and especially shall they give such certificates or receipts to cover all such Virginia deferred certificates as have been or may be deposited with them and not covered by certificates or receipts previously given to the commission; and the said Virginia Commission are hereby given and *invested with the full and complete control and right to dispose of all deferred certificates now or hereafter covered by or embraced in the receipts and certificates of Brown Bros. & Co., as aforesaid.*

"3rd. The said Virginia Commission hereby stipulate and agree, by and with the advice and approval of the attorney-general of Virginia, that, in their judgment, it is needful and proper, in order to protect the interest of the State and bring about and carry into effect a settlement in the premises, *that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States asking for an adjudication and settlement by that court* of the matters aforesaid unsettled and undetermined be-

tween the two States, arising or growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia, of March 6th, 1900, referred to in said contract of December 14th., 1904; and the said Virginia Commission acting by and with the advice and approval of the attorney-general of that State, do hereby undertake and *agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid,* as soon as the pleadings, papers and documents relating thereto can be convenienty and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the said General Assembly of March 6th, 1894, also referred to in said contract of December 14th, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia as to the deferred certificates placed subject to the control of the commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said commission, notwithstanding the institution and pendency of such suit.

"4th. And the Virginia Commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and act of the General Assembly of Virginia, *they will account for, pay over and deliver such amount, either in cash or securities,* as may be realized from West Virginia through any settlement made by the said commission with that State, either by means of an adjudication or recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, *to the said depositing committee in full settlement and satisfaction of all claims under said certificates;* and the said depositing committee agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said commission

and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, *in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned,* and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

"5th. It is further understood and agreed that if from any cause the said commission shall fail or be unable to bring about such adjustment or settlement or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said commission to restore to the control of the said depositing committee all such deferred certificates as may have been placed subject to the control and disposal of said commission as aforesaid.

"RICHMOND, VA., *November 24th,* 1905."

his contract was signed by all the members of the de- ing committee and the Virginia Commission, and ap- ed by the attorney-general on the day of its date.

appears from one of the exhibits attached to and made rt of the bill that the total amount of certificates issued 'irginia on acount of West Virginia's alleged proportion ie public debt was as follows:

er the act of 1871	$15,281,970.47
er the act of 1879	564,258.87
er the act of 1882	1,775,603.48
er the act of 1892	605,320.78
Total	$18,227,153.60

(R., p. 90.)

It appears that on January 4, 1906, certificates to the amount of $13,173,435.41 had been deposited by the committee with Brown Brothers and Company, and that they have been withdrawn by the Virginia Commission and are now in its custody or under its exclusive control.

For the owners of the whole amount of certificates issued, whether they have or have not been deposited with the committee or with the commission, Virginia sues as trustee in this case under the contracts and statutes to which we have referred.

The prayer of the bill is as follows:

> "Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her governor and attorney-general, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right *and as trustee as aforesaid;* that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by

the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet."

The bill has been demurred to on the following grounds:

First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

Fifth. That it does not appear by said bill that the attorney-general has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant.

The first question to be considered in the case is whether this court has jurisdiction to hear and determine the causes of action, or any of the causes of action, alleged in the bill, for if no cause of action is alleged upon which the plaintiff is entitled to a judgment or decree in this court, it will not decide any of the other questions presented by the demurrer. Jurisdiction is the power to hear and determine a cause between the parties to the action who are before the court, and to render a final judgment or decree and enforce its execution by judicial process. Judicial tribunals cannot take cognizance of controversies merely for the purpose of ascertaining and declaring what the legal or equitable rights of the parties are. They must render judgments or decrees which remedy the wrongs complained of, or enforce the rights asserted in the case; in other words, their powers are remedial, not merely declaratory.

Jurisdiction is defined by Bouvier as "the authority by which judicial officers take cognizance of to decide causes. Power to hear and determine a cause (3 Ohio, 494; 6 Pet., 591). The right of a judge to pronounce a sentence of the law on a cause or issue before him acquired through due process of law. It includes power to enforce the execution of what is decreed. (8 Johns., 239; 3 Met., Mass., 460; Thach., 202" (2 Bouvier Law Dic., 26).

In defining jurisdiction, Black says:

> "The power and authority constitutionally conferred upon or constitutionally recognized as existing in a court or judge to pronounce the sentence of the law or to award the remedies provided by law upon the set of facts proved or admitted, referred to the tribunal for decision and authorized by law to be the subject of investigation or action by that tribunal, and in favor or against persons (or a *res*) who present themselves, or who are brought before the court in some manner sanctioned by law as proper and sufficient. Jurisdiction is a power constitutionally conferred upon the judge or magistrate to take cognizance of and determine a cause according to law and to carry a sentence into execution (6 Pet., 591; 9 Johns., 239; 2 Neb., 135)."
>
> Black's Law Dictionary, page 63. See also Anderson's Words and Phrases, page 3877-813; also Am. & Eng. Ency., vol. 17, page 1041; *Daniels v. Tearney,* 102 U. S., 418; *Applegate v. Lexington,* etc., 117 U. S., 267; *Simmons v. Saul,* 138 U. S., 454; *Holmes v. Oregon,* 5th Fed., 534; 9th Fed., 232; 6 Sawyer, 385; *Grignon v. Aston,* 2 How., 385; *U. S. v. Arredondo,* 6 Pet., 691; *Decatur v. Paul.,* 14 Pet., 599; *In re Bogart,* 2 Sawyer, 401; 3 Fed. Cases, No. 596, *Le Roy v. Clayton,* 2 Sawyer, 499; 15 Fed. Cases, No. 8258, *Riggs v. Johnson County,* 6 Wall., 187; *McNitt v. Turner,* 6 Wall., 366; *Cornett v. Williams,* 20 Wall., 240.

The bill, so far as it relates to the old debt of Virginia, although it sets up all the provisions of the compact, seems to be framed upon the theory that West Virginia is liable for one-third of the debt as it existed prior to the first day of January, 1861, upon the alleged ground that the formation of the new State diminished the territory and population of the original or parent State to that extent. It is evident, however, that no such rule can be applied here, for this is not a case in which West Virginia's "just proportion" of the debt is to be determined upon such rules or principles as a court may decide to be fair and equitable, but is to be ascertained and paid according to a method agreed upon by the parties; and that method must be observed, whether the action is prosecuted at law or in equity. The liability of the defendant State, if any exists, is founded entirely upon a compact entered into between the two States with the consent of Congress, and the adjustment must therefore be made according to its terms. No rule, or supposed rule, of international law can be applied in such a case.

By the ordinance of the Wheeling convention, which represented the State of Virginia, consent was given to the formation of a new State out of a part of her territory, and it was provided, as we have already seen, that it should take upon itself a just proportion of the public debt of Virginia existing prior to the first of January, 1861, which, according to the ordinance, was to be ascertained by charging to the new State all the State expenditures within the limits thereof and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of the State of Virginia during that period from the counties included within the new State.

It was also provided that all private rights and interests in lands within the proposed new State derived from the laws of Virginia prior to the separation should remain valid and secure under the laws of the proposed State and should

be determined by the laws then existing in the State of Virginia. At the time of the passage of this ordinance there was, of course, no State of West Virginia, and therefore no second party to the proposed compact or agreement. Subsequently the people inhabiting the counties proposed to be included in the new State held a sovereignty convention and adopted a constitution preparatory to admission into the Union. This was the first time the new State, or proposed new State, had the capacity to assent to, or dissent from, the proposition submitted by Virginia, and it assented to it with the qualification, or addition, that its equitable proportion of the debt should be ascertained by its own legislature as soon as practicable, and that the legislature should provide for its liquidation by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years. But this did not complete the compact, for Congress had not yet given its consent, which was necessary under the Constitution of the United States.

Afterwards application was made by the proposed new State for admission to the Union under the Constitution containing the provisions above recited; and, on the 31st day of December, 1862, an act was passed by Congress providing for its admission upon certain conditions, none of which had any reference to the indebtedness of the old State (12 Stat., 633). This act of Congress recited that the "Legislature of Virginia, by an act passed on the 13th of May, 1862, did give its consent to the formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia," etc., etc. The Virginia act of May 13, 1862, was passed while the application of West Virginia for admission into the Union was pending, and its first section provided that the consent of the legislature of Virginia is given to the formation and erection of the State of West Virginia within the jurisdiction of that State, to include certain counties which are mentioned in the act, "according to the boundaries *and under the provisions*

set forth in the Constitution for the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

It was further provided that—

> "This act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."
>
> *See Constitution and Statutes of Virginia and West Virginia, 1861-66, page 3, Acts of Extra Session, May, 1862.*

The schedule attached to the constitution of West Virginia and referred to in the act declared that "when the General Assembly of the State of Virginia and the Congress of the United States shall severally give their consent to the formation and erection of the State of West Virginia as proposed, the commissioners hereby appointed shall forthwith issue their proclamation," etc., etc.

Finally, on the 20th day of June, 1863, the State of West Virginia was admitted into the Union under the constitution framed by its convention, approved by the State of Virginia and the Congress of the United States. And thus the consent of that body was given to all the provisions of the agreement and it became a legal and constitutional compact between the two States.

Virginia v. West Virginia, 11 Wall., 39.
Green v. Biddle, 8 Wheat., 1-86.
Virginia v. Tennessee, 148 U. S., 503.

West Virginia having agreed to the proposed compact, upon the conditions that her own legislature should ascertain the amount of the debt and provide for its liquidation

in a certain manner and the reconstructed State of Virginia having been authorized by Congress to elect delegates to frame a constitution, proceeded to do so, and in 1867 adopted a constitution, the 19th section of article 10 of which contained the following provision:

> "The General Assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia, and shall provide that such sum *as shall be received from West Virginia* shall be applied to the payment of the public debt of the State."

In 1902, after Virginia had settled with her creditors, a new constitution was adopted, which omitted this section and contained no provisions upon the subject of a settlement with West Virginia.

It appears plainly from the foregoing that essential parts of the compact as agreed to by West Virginia were that the legislature of that State should ascertain what was her just proportion of the debt; that it should provide for its liquidation by the establishment of a sinking fund; that the State of Virginia assented to this condition by consenting to the admission of the new State "under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed," and that Congress admitted the State under that Constitution, thereby consenting to the compact with the conditions constituting a part of it.

The two States have therefore, by compact between themselves, and with the consent of Congress, as required by the Constitution, designated a tribunal to ascertain and settle West Virginia's share of the debt. This tribunal still exists and is unquestionably competent to discharge the duties imposed upon it. And, moreover, but most important of all, it is the only tribunal existing, or that can be established, possessing the power to provide for the payment of West Virginia's share of the debt when the same has been ascer-

tained in accordance with the terms of the compact. It cannot be coerced by any judicial or other civil process known to the Constitution or laws of this country. No court can compel it either to adjust the debt or to provide a sinking fund, or impose taxes, issue bonds, or appropriate money.

Conceding, for the sake of the argument, that Virginia might maintain a suit in this court as trustee, the question must be considered whether the bill states a good cause, or good causes, of action in favor of the plaintiff, either in her own right or as trustee for the parties. Clearly there is no cause of action shown against West Virginia under the provisions of the act of February 4, 1863, which is embodied in the bill (R., p. 4). The first section of that act appropriates $150,000 to the State of West Virginia when it shall be organized and admitted into the Union; but it does not provide that the new State shall account for it in any way. Whether the whole of the sum appropriated, or, if not the whole, what part of it, had been paid into the treasury by the counties located within the boundaries of the proposed new States does not appear from the act, and is not alleged in the bill. As there was no provision that it should be accounted for or repaid to Virginia, the presumption is, especially in the absence of an allegation upon that subject, that it was in fact collected from the West Virginia counties, or that it was intended as a gratuity to the new State. The bill being silent upon the subject and every presumption being against the pleader in such a case, the court cannot infer a cause of action in favor of the plaintiff. The second section of the act shows plainly on its face that it appropriated no money except what had been actually collected from the counties within the proposed boundaries of the new State, and as it was not required to account, and never agreed to account, no cause of action, legal or equitable, can be based on that part of the statute.

The other act under which a claim is made in this action was passed February 3, 1863 (R., p. 4). In brief, the first sec-

tion of that act transfers to West Virginia certain public property "within the boundaries of the proposed new State of West Virginia when she becomes one of the United States," and declares that the title shall pass without any other assignment, conveyance, transfer or delivery than is therein contained. The second section provides that if the appropriation of the property, stocks, and securities made by the act shall take effect, the State of West Virginia "shall duly account for the same in the settlement hereafter to be made with this State." The bill alleges that the plaintiff "is informed, believes, and so charges" that the property transferred under this act consisted of a number of items, and that its value amounted to "several millions of dollars," but that the plaintiff is "unable to state at this time the exact amount." It is then alleged that the State of West Virginia realized from the bank stocks alone "about six hundred thousand dollars;" but there is no allegation as to their value at the time of the transfer.

It is evident that the "settlement hereafter to be made with this State" means a settlement of West Virginia's just proportion of the old public debt which had been provided for by the ordinance of the Wheeling convention and by the constitution of West Virginia, which was then before Congress on her application for admission into the Union. In the adjustment provided for in the compact West Virginia was to be charged with "all the State expenditures within the limits thereof," since any part of the debt was contracted, and consequently the State of Virginia, in order that it might not thereafter be claimed that the expenditures on account of the public property transferred by the act of February 3, 1863, were not to be included in the settlement under the compact, expressly provided that they should be. The bill therefore shows an attempt to make two causes of action out of one—a separate cause of action based upon the compact for the recovery of the amount of money originally expended by the State of Virginia in paying for the property so transferred, and another cause of action founded on

the statute. The State of Virginia of course retained all the public property situated within her own boundaries after the separation, and it was the intention of Virginia that West Virginia should become the owner of all within her limits and should, in the settlement under the compact, account to the old State for the expenditures made by that State in procuring it.

We think enough will be said, and suggested, in other parts of this argument to establish the proposition that the State of Virginia has not alleged, and cannot allege, either in her own right, or as trustee, a good cause of action against the defendant State on the compact. Before she could possibly sue the defendant State, either at law or in equity, to recover for contribution, she must have paid the whole debt, or at least she must have paid more that her own legal or equitable share of it. As the case is now presented, neither Virginia nor her creditors have been injured in the slightest degree by the fact that West Virginia has not paid her proportion of the debt. Virginia has not been injured, because she has herself paid, or extended, only that part of the debt which, according to her own judgment, she would have been justly required to pay if West Virginia had fully complied with her alleged obligations, and she has been released from all the remainder; and the creditors have not been injured by any alleged default on the part of West Virginia, because they never had any claim, legal or equitable, against her and have voluntarily discharged their only debtor from liability. It is elementary law that if one owes a debt and another agrees with him—not with the creditor—that he will furnish a part of the money to pay it, or that he will reimburse the debtor as to a part of it, the original debtor cannot sue for contribution until he has paid the debt, and certainly not until he has paid his own share and some part of what the other agreed to furnish or reimburse; and in the latter case he could sue only for what he had paid in excess of his own share. The applicability of this legal and equitable rule is the same whether the liability to contribute

is founded on an express contract between the parties or is implied, as in the case of cosureties.

It is not alleged in the bill that the State of Virginia has ever made an account or statement of her claim under the compact and presented it for payment or adjustment. On the contrary, it is shown by the bill and exhibits that as early as 1871, if not before that date, Virginia repudiated the compact and arbitrarily decided that West Virginia was liable for one-third of the debt, and has always, at least up to the time of the institution of this suit, insisted upon an adjustment on that basis only. This is shown by the preambles and provisions of every act passed providing for an adjustment with her creditors; and in the joint resolution of March 6, 1894, creating a commission to settle with West Virginia, it was declared:

> "But such commission shall in no event enter into negotiations hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof."
> (R., p. 40.)

This restriction upon the power of the commission has never been repealed, and that body has now no power to negotiate with the defendant State upon any other basis. It is a mockery, however, to characterize such a proceeding as a "negotiation." An ultimatum was presented at the very beginning, and West Virginia was distinctly informed that she must recognize her liability to pay one-third of the debt, or have no adjustment. Under this proposition no accounts were to be presented or examined, no vouchers or other documents were to be considered, except such as would show the amount of the debt prior to January 1, 1861; the terms of the compact were to be wholly ignored and nothing was to be done except to divide the amount of the debt by three. West Virginia was perfectly justifiable in declining to "negotiate" upon such a basis as this.

If the allegations contained in paragraphs fifteen and sixteen of the bill (R., p. 9) are to be regarded by the court as setting up a cause of action for West Virginia's equitable proportion of the debt, the plaintiff is claiming in this case a double liability upon the part of that State—a liability for her equitable proportion, or for one-third, of $33,000,000, the alleged amount of the whole public debt on the 1st of January, 1861, and also a liability for her equitable proportion, or one-third, of the $25,000,000 alleged to have been paid by Virginia, which is a part of the $33,000,000. We do not think, however, that the court can regard the general and indefinite allegations in the paragraphs to which we have referred as even a serious attempt to state a cause of action; but if it is, then the bill contains three separate claims instead of two.

But it is clear that Virginia could not under the ordinance, or upon any principle of law or equity, have a cause of action against West Virginia for contribution to the payment of her (Virginia's) own equitable share of the debt, either before or after she had paid it; nor can that State recover against West Virginia any part of the old debt from which she has been released and discharged by her creditors.

We have endeavored to show that if Virginia, either in her own right or as trustee, ever had a cause of action against West Virginia on account of the old debt, it was founded on the compact, and the sum she had a right to demand was to be ascertained and paid in the manner prescribed in the compact; but that State and her creditors have, without consulting West Virginia, created a situation which renders it impossible for this court, or any other tribunal, now to adjust the liability of the latter State in the manner therein prescribed without doing great injustice to her. An examination of the Wheeling ordinance shows that the amount of the Virginia debt as it existed prior to January 1, 1861, is not a factor to be taken into consideration in ascertaining

West Virginia's just proportion. It is alleged in the bill that the debt at the time of the separation amounted to "about $33,000,000." When Virginia passed the ordinance, and when West Virginia accepted it with the modifications as to the manner of ascertaining and paying the debt, both parties knew what the amount of the indebtedness was; and it was agreed between them that if West Virginia was charged "with all the State expenditures within her limits and a just proportion of the ordinary expenses of the State since any part of the debt was contracted, and credited with the moneys paid into the treasury of the Commonwealth from the counties included within the proposed new State during the same period," the result would show what was her just proportion of the debt; that is, her just proportion of $33,000,000. If Virginia had repudiated the entire debt, or had admitted her liability for only $5,000,000, or for any other sum less than the $33,000,000, and her creditors had settled upon such a basis, it could scarcely be seriously contended that West Virginia would still be liable to her for exactly the same amount as if she had paid, or adjusted, the whole $33,000,000; and yet that will necessarily be the result if the mode of settlement provided for in the compact is applied to a situation which Virginia and her creditors have now created. The State of Virginia has not paid the debt, but has extended two-thirds of it, which she decided for herself was her equitable share, and has been released from all the remainder; but she now asks that West Virginia may be compelled to pay to her in her own right, or as trustee, the same amount precisely as if the whole debt had been paid or settled by the issue of new bonds.

It is important to bear in mind throughout the consideration of this case that West Virginia's obligation to pay a just proportion of the debt was to Virginia alone, not to the bondholders. As to the bondholders, Virginia was legally the sole obligor and has always remained so. Neither changes in her constitution of government nor in her territorial area

could affect in any degree her liability under her previous obligations. Notwithstanding such changes in either of these respects, the State continued to be the same political entity which incurred the obligation, and the compact by which West Virginia agreed to pay her just proportion of the obligations was made between the two States alone, not between them and the bondholders, and the settlement was to be made between the two States. We doubt whether, in the absence of a compact on the subject, the State of West Virginia would have been legally liable to pay any part of it to Virginia, or to reimburse the parent State on account of any part of it; but as there was a compact, the discussion of these propositions would be purely academic in this case.

If the court has any power to render and enforce a judgment or decree in this cause which would afford to the plaintiffs effective and final relief, it must be a judgment or decree for a definite sum of money found to be due to the State of Virginia on a settlement made in the mode provided by the compact, or else the solemn compact entered into with the consent of Congress, thereby becoming, as this court said in *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How., 185, "a law of the Union," must be wholly disregarded and the amount of the judgment or decree must be ascertained according to some other rule or principle, adopted by the court, to which the parties refused to assent when the compact was made. The adoption of the latter method is not even supposable, for the compact is either valid or invalid; and if it is valid, it cannot be disregarded by the court, while if it is invalid the consequence would be that West Virginia was unconstitutionally admitted and is not now a State of the Union, and therefore cannot be sued as such.

In *Green v. Biddle*, 8 Wheat., 1–85, 86, this court said:

> "Now, it is perfectly clear that although Congress might have refused their consent to the proposed

> separation, yet they had no authority to declare Kentucky a separate and independent State without the assent of Virginia *or upon terms variant from those which Virginia* had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The terms and conditions, then on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of Congress, without which Kentcky could not have become an independent State; and then it would follow that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true."

In *State of Penna. v. The Wheeling Bridge Co.*, 13 How., 518, 566, the court, speaking of this same compact, declared (p. 566):

> "This compact, by the sanction of Congress, has become a law of the Union," citing *Green v. Biddle, supra.*

In the case of *Poole v. Fleger*, 11 Pet., 185, 209, the court construed the compact between Kentucky and Tennessee, consented to by Congress, determining a matter of boundary, and it held that—

> "The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

If the court is to found its judgment or decree upon the compact, it must take the place of the legislature of West Virginia in the determination of the amount due, and then

it must also disregard the terms of payment provided for in the constitution of that State, which is a part of the compact, or it must in some way establish a sinking fund sufficient to discharge the interest and principal of the debt at the end of a series of years. It may be observed here that the sinking fund contemplated by the constitution of West Virginia was not intended to be, and in fact could not be, established until the amount of that State's proportion of the debt had been ascertained by the legislature, for until that had been done it was not possible to know what sum would be required to produce the necessary accumulation.

Leaving out of consideration the untenable proposition that the compact is to be disregarded and the adjustment made according to some rule or principle not recognized in it, the demand of the plaintiffs is, in substance and effect, that the court shall decree and enforce a specific performance of the compact, for if that is not the object of the suit, it presents only a moot question which the court will not decide. A mere declaration of the principles upon which an accounting shall be had and the taking of the account accordingly, to be followed by no enforceable judgment or decree, affords no relief and would therefore be an idle and useless proceeding. Besides, it is wholly unnecessary for the court to declare the principles upon which the adjustment shall be made; that is plainly done in the compact.

We have said that this court could not compel the legislature of West Virginia to levy a tax or appropriate money or issue bonds to provide for the payment of any judgment or decree which might be rendered in this case; and we may add that it could not even appoint a receiver or commissioner to collect a tax or to issue bonds for that purpose even if the tax had been imposed by the proper legislative authority, or the issue of bonds had been duly authorized.

The authorities upon this and analogous questions are numerous and conclusive. In *Rees v. City of Watertown* (19 Wall., 107), which was a suit in equity to enforce the

collection of certain judgments upon the bonds of the city of Watertown, the court said:

> "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

And, after referring to the statute, the court said:

> "But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally this jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says: 'There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate,' of which he cites many instances. Lord Talbot says: 'There are cases, indeed, in which a court of equity gives a remedy where the law gives none, but where a particular remedy is given by law, and that remedy

> bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.' "

Again the court said:

> "A court of equity cannot, by avowing that there is a wrong and no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens."

Again the court said, in the course of its opinion:

> "The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceedings."

In *Heine v. The Levee Commissioners* (19 Wall., 655) the court said, speaking of the right to give a party the relief demanded:

> "If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which in the imperfection of human nature often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, and the law affords no relief.
>
> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or

national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an evasion by the judiciary of the federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

In *The State Railroad Tax Cases* (92 U. S., 575), speaking of the want of authority in judicial tribunals to interfere with the process of collecting taxes, the court said:

> "It is a wise policy. It is founded in the simple policy derived from experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of enforcing it are necessary than those which belong to courts of justice. See *Cheatham v. Norvell*, decided at this term; *Nickoll v. United States* (7 Wall., 122); *Dow v. Chicago* (11 Ill., 108)."

In *Merriweather v. Garrett* (102 U. S., 472), the court said, on page 501:

> "The power of taxation is legislative and cannot be exercised otherwise than by the authority of the legislature. * * * Taxes can only be collected under authority of the legislature. If no such authority exists the remedy is by appeal to the legislature which alone can grant relief."

And Mr. Justice Field, for himself and Mr. Justice Miller and Mr. Justice Bradley, in a concurring opinion, said, on page 515:

> "The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. Levying taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In a distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare and to provide the revenues for the support and due administration of the government throughout the State in all its subdivisions. Having the sole power to authorize the taxation, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced.
>
> "It is the province of the courts to decide cases between parties and in so doing to construe the constitution and statutes of the United States and of the sovereign States and to declare the law, and when their judgments are rendered, to enforce them by such remedies as legislation has prescribed or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain and encroach upon the other departments of the government, and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of the government, and is essential to its successful administration."

In *Heine v. The Levee Commissioners* (1 Wood, 247), in the United States circuit court, the opinion was delivered by Mr. Justice Bradley, and, speaking of taxation, he said:

> "The judicial department has no power over the subject. If the officers who are charged with the

duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative of the writ of mandamus, compel them to perform acts which are ministerial as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject unless the legislation has expressly conferred upon it further powers."

Louisiana v. Jumel (107 U. S., 711) was a bondholders' bill against the State board of liquidation, alleging that the State had impaired the obligation of an express contract, and there was also a petition for a mandamus against the board and the State auditor and treasurer. The object of the proceedings was to compel the State officers to pay from the general funds of the State the repudiated bonds and coupons held by the complainants. The court said:

"In neither of the suits was any inquiry to be instituted in respect to the particular bonds and coupons held by the plaintiffs, or any special relief afforded as to them. All that is asked will inure as much to the benefit of the other holders of similar obligations as to the particular parties to these suits. So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view.

* * * * * * *

"In *United States v. Lee,* 106 U. S., 196, it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be

had. Here, however, the money in question is lawfully the property of the State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.

"Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the auditor of State, the treasurer of State, and the board of liquidation may be required to enforce the act of 1874, and 'carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, * * * according to the full and true intent and purport of that act.' Certainly no suit begun in the circuit court for such relief would be entertained, for that court can ordinarily grant a writ of mandamus only in aid of some existing jurisdiction. *Bath County v. Amy*, 13 Wall., 244; *Davenport v. County of Dodge*, 105 U. S., 237. Our attention has been called to no case in the courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the circuit court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed,—a question we do not deem it necessary to now decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question

until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

And in the case of *Thompson v. Allen County*, etc. (115 U. S., 550), the whole subject was again reviewed by this court, upon a certificate of division from the circuit court. Two of the questions certified were:

1. Whether taxes levied under judicial direction can be collected through a receiver appointed by the court of chancery, if there is no public officer with authority from the legislature to perform the duty.

2. Whether taxes levied by State officers under judicial direction can be collected through a receiver appointed by the United States court where the legislature has provided an officer to collect, but there is a vacancy in office and no one can be found willing to accept the office.

This court answered these questions in the negative. (See also the same case reported in 13 Fed. Rep., 97, Mr. Justice Matthews delivering the opinion.)

It is evident that a judgment or decree in this case must be for money only and must be enforced, if enforced at all, either by a sale of the State's property or by taking control of its legislative and executive authorities and compelling them, by some process not heretofore known to our jurisprudence, to appropriate money from the State treasury for the satisfaction of the debt, or to levy taxes or issue and sell bonds for that purpose. The question whether any of these remedies can be afforded must, it seems, be directly met and finally settled in the present case if there is any good cause of action shown; for, as before said, there is no allegation that there is a lien or trust or any other element involved in either of the alleged causes of action to require the application of any remedy except a judgment or decree for money.

The jurisdiction of this court in an action brought by one State against another to settle a question of boundary, or to secure redress for wrongs and injuries perpetrated by another State upon the territorial rights of the complaining State, or upon the rights of large communities of its people, has been definitely settled by a long series of cases, beginning with *Rhode Island v. Massachusetts* (12 Peters, 657) in one class, and ending with the other class in the two cases of *Kansas v. Colorado* (185 U. S., 125) and *Missouri v. Illinois* (180 U. S., 208, and 200 U. S., 496). But when this court decides a question of boundary between two States, or the boundary between a State and a Territory of the United States, no judicial process is necessary to carry its judgment or decree into effect. When the fact as to the true location of the line of separation has been found by the court, the political departments of the Government, as well as the courts of the States concerned, are bound to recognize its adjudication as conclusive of the question, and the territory formerly in dispute must be thereafter treated as part of the State to which it has been awarded. It will be included by the legislative department of the

United States in the congressional and judicial districts of that State, and its people will be recognized as qualified electors in the choice of members of the House of Representatives, and their representatives in the State legislature will be recognized as qualified electors in the choice of members of the United States Senate for that State. The executive department of the United States, in the exercise of its authority under the Constitution, in the execution of its powers concerning the constitutional and legal relations between the State and the general government, will also treat the territory as part of the State to which it has been adjudged to belong. No State which has lost part of its territory by such adjudication could, therefore, prevent the practical execution of the judgment or decree by legislation or otherwise; for every attempt to continue the exercise of its own jurisdiction over it would be defeated, not only by the political departments, but by the courts as well. So far as we have been able to ascertain, no judicial process has ever been issued or applied for to carry such judgments or decrees into effect, except an order directing the established line to be surveyed and properly marked.

In the other class of cases, where trespasses or nuisances are complained of, and where the acts complained of are done by or under the authority of the defendant State, a decree of this court enjoining the continuance of the wrongs would be binding upon all the officers and agencies of the State, and upon all other persons who might thereafter knowingly participate in the violation of the decree, and they could all be punished for contempt. A power to make and enforce a decree in such a case is very different from the power to make and enforce a decree requiring the legislative or executive authorities of the State to take affirmative action in regard to matters which their own constitution and laws, and the plan and theory of our dual system of government, have committed to their own exclusive judgment and discretion.

There is no fact alleged that would authorize a court of equity to take jurisdiction for the enforcement of such claims as are set up in this case. But, waiving that subject for the present, we propose to confine ourselves in this part of the argument to the question whether this court, under that provision of the constitution which confers upon it jurisdiction over cases in which a State shall be a party, has the power, either in equity or at law, to hear and determine a case in which the final relief demanded is the rendition and enforcement of a simple judgment for money against a State. In *United States v. North Carolina*, 136 U. S., 217, which is one of the cases relied upon to show the jurisdiction of this court in an action against a State for the recovery of money, not only was there no objection made to the jurisdiction at any stage of the proceedings, but the whole case, which involved no question of fact and only a single question of law, was, by the written consent of the parties, submitted to the court for its decision. It has been decided by this court that a State may waive its privilege and submit itself to the jurisdiction of any court at the suit of another State, or at the suit of an individual.

Beers v. Arkansas, 20 How., 527.
Clark v. Bernhard, 108 U. S., 115.

In the case last cited the court said:

> "The immunity from suit belonging to a State which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that a suit otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while of course those courts are always open to it as a suitor in controversies between it and citizens of other States."

We do not think, therefore, that the case relied upon can be properly considered as a conclusive adjudication that this court has jurisdiction of an action against a State for the recovery of a money judgment when the State has not consented to be sued, but is protesting. Besides, the court, after considering the question submitted by consent of the parties, found that nothing was due from the State and therefore was not required to render a judgment against it. What it would have done if it had found against the State, whether it would have decided that it had power to render and enforce a judgment for the payment of the money, cannot, of course, be known; but from what was subsequently said and done in the case of *South Dakota v. North Carolina*, 192 U. S., 286, we are at liberty to say that the question of power in the court to render and enforce such a judgment is at least still open.

In the case last referred to the court said:

> "But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State, is exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. *Meriwether v. Garrett*, 102 U. S., 472, 513. As a rule, no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."

The court then refers to the cases of *Rees v. City of Watertown* (19 Wall., 107) and *Heine v. The Levee Commissioners* (19 Wall., 655) and says:

> "In this connection reference may be made to *United States v. Guthrie*, 17 How., 284, in which an

application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303):

"'The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests.'

"Further, in this connection may be noticed *Gordon v. United States*, 117 U. S., 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress power to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704):

"'The award of execution is a part, and an essen-

> tial part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. * * * Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.'"

The court also cited *In re Sanborn*, 148 U. S., 222, and *La Abra Silver Mining Company v. United States*, 175 U. S., 423, 456, and proceeded to say:

> "We have, then, on the one hand the general language of the constitution vesting jurisdiction in this court over 'controversies between two or more States,' the history of that jurisdictional clause in the convention, the cases of *Chisolm v. Georgia*, *United States v. North Carolina*, and *United States v. Michigan* (in which this court sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expressions of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties."

The decision of the question never became necessary, for the reason that the parties afterwards settled the matter be-

tween themselves, so that all that the court actually did in that case was to enforce a lien.

In *United States v. Michigan*, 190 U. S., 379, the opinion of the court was delivered upon a demurrer which, of course, admitted all the material allegations of the bill, and the court decided that the State of Michigan held certain funds and certain tools and machinery appertaining to the Saint Mary's River canal in trust for the United States, and that on the face of the bill the United States had a right to demand an accounting and a payment of the sum found due.

In the opinion it was said:

> "In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.
>
> "Whether, under these circumstances, technical words were used to express the thought that the State was to be trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. *Winona &c. R. R. Co. v. Barney*, 113 U. S,. 618, 625."

And after an examination of the question the court held that the State was a trustee for the United States as to the money and property in its possession, and it overruled the demurrer and gave the defendant leave to answer.

In *Kentucky v. Dennison*, 24 Howard, 66, where a law had been constitutionally enacted by Congress making it the duty of the governor of a State to surrender fugitives from the justice of other States, the court held that the suit was against the State, although the governor was the only party

made defendant on the record, and in the course of the opinion it said:

> "But the language of the act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the governor, it evidently points to the duty imposed by the constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the Constitution of the United States and became a member of the Union. It was so left by the constitution, and necessarily so left by the act of 1793.
>
> "And it would seem that when the constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'
>
> "But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him" (pp. 109, 110).

In *Missouri v. Illinois*, 200 U. S., 496, in which no judgment or decree for money was demanded, the court said:

> "In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one

which must be implied from the words of the constitution. The constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizen of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law, and, if so, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principle it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line and in so doing must be governed by rules explicitly or implicitly recognized (*Rhode Island v. Massachusetts*, 12 Pet., 657–733). It must follow and apply those rules even if legislation of one or both of the States seems to stand in the way. But the words of the constitution would be a narrow ground upon which to construct and apply to the relations between States the same system and municipal law in all its details which would apply between individuals. If we suppose a case which did not fall in the power of Congress to regulate, the result of a denial of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

"The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new."

In every case since the adoption of the eleventh amendment to the Constitution where the court has found that the effect of granting the relief sought by the plaintiff would be to enforce the claim of an individual, whatever may be its nature, against a State, it has denied its power, or the power of any other court of the United States, to do so. It can make no difference what means or devices the parties

may have resorted to for the purpose of getting the case into the court, if it appears that the real object of the action and the effect of the judgment or decree would be to conclude the State itself, and not merely its ministerial officers or agents, the court has refused to exercise jurisdiction for that purpose.

> See *Hollingsworth v. Virginia*, 3 Dall., 378; *Osborn v. Bank*, 9 Wheat., 738; *Briscoe v. Bank*, 11 Pet., 257; *Jumel v. Louisiana*, 107 U. S., 710; *N. H. v. Louisiana*, 108 U. S., 726; *Poindexter v. Greenhow*, 114 U. S., 270; *Marye v. Parsons*, 114 U. S., 325; *Hagood v. Southern*, 117 U. S., 52; *In re Ayres*, 123 U. S., 443; *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S., 233; *Louisiana*, etc., *v. Steele*, 134 U. S., 230; *Penoyer v. McConnaughy*, 140 U. S., 1; *In re Tyler*, 149 U. S., 164; *Reagon v. Farmers' Loan and Trust Co.*, 144 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Tindel v. Wesley*, 167 U. S., 204; *Smith v. Ames*, 169 U. S., 466; *Fitz v. McGhee*, 172 U. S., 516.

This being the law, it is not possible to see how the State of Virginia can maintain an original action as trustee in this court for the avowed use and benefit of individuals on claims in which she as a State has no interest. To sustain such a proceeding would be a palpable evasion of the eleventh amendment, and would establish a precedent which would practically nullify that provision of the organic law by conferring original jurisdiction upon the court in every case where an individual might choose to transfer his real property or his goods and chattels, or choses in action, to a State as trustee, even if it were done, as in this case, for the sole purpose of conferring jurisdiction on this court. Certainly it cannot be held that a controversy between two States, justiciable in this court, can be created by the transfer of a claim on behalf of an individual to one of the States as a

mere trustee to sue and collect it, whatever may be the law in a case where the complaining State is itself the real and beneficial owner of the claim sued on. But this precise question was presented in the case of *Kansas v. United States*, decided February 25, 1907, and not yet reported, and the court disposed of it in a single sentence. After finding that the State was suing as trustee for the Missouri, Kansas and Texas Railway Company, the court said:

"In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of a claim of the railroad, and our original jurisdiction can not be maintained;" and the court held that as the United States has not consented to be sued the bill must be dismissed.

We cannot see how the provision of the Constitution which confers upon this court jurisdiction in cases in which a State shall be a party can be properly so construed and applied as to destroy, or disarrange, the distribution of powers between the federal government and the States, which that instrument establishes. To hold that the judicial tribunals of the United States, whether the case be in equity or at law, can seize and sell the property of a State or direct money to be paid out of its treasury, or assume control over its legislative and executive departments and decree when and how, and for what purpose, they shall exercise their constitutional authority, would be destructive of the independence of the several States in the management and control of their own internal affairs. Yet it is indisputable that if such tribunals possess the power to render valid judgments and decrees in such cases, they must be enforced by some one of the means we have stated.

Some other interpretation must therefore be given to the constitutional provision, some interpretation which will be consistent with the character of our political institutions and at the same time invest this court with original jurisdiction to hear and determine all controversies between

States which affect their rights as States—that is, as political organizations clothed with the authority and charged with the duties of government. It is the duty of a State as such to preserve and protect its territorial area against the encroachments of another State; to see that the lives, health, and safety of its citizens are not impaired or endangered by the action of another State or by its authority; and when controversies arise concerning these matters, or others of like character, this court has original jurisdiction to hear and determine them. There is, in fact, no other way to settle them except by negotiations or war, and the latter is prohibited by the constitution. To confine the jurisdiction to controversies of the character indicated and decline its exercise in cases where the enforcement of a judgment or decree would destroy or impair the sovereign authority of the States, would establish a reasonable construction of the constitution and accomplish all its real beneficial purposes.

There are many controversies between individuals which no judicial tribunal can take cognizance of, notwithstanding the comprehensive terms in which their jurisdiction is conferred, many rights which cannot be enforced, and many wrongs which cannot be redressed by the courts. Although they were established for the purpose of administering justice, it often happens that they are incapable of doing so by reason of the character of the questions involved or the character of the remedies required.

It is safe to say that if the framers of the constitution had expressly provided that this, or any other tribunal of the United States, should have power to seize and sell the property of a State or control the legislative and executive authorities of a State in any matter concerning its financial or other internal affairs, their work would have been rejected, and we do not think such an extraordinary power should be now implied from the general grant of original jurisdiction to this court in cases where a State is a party.

While it appears from the quotations made from the

opinion in *South Dakota v. North Carolina* that in the judgment of this court the question as to its jurisdiction to render and enforce a judgment or decree against a State in a suit on a contract for the payment of money, where no lien or trust exists, is still an open one, yet, in view of the facts that it has been elaborately discussed at the bar and much considered by the court in previous cases, we do not propose in this brief to repeat the arguments or cite further authorities. Some questions have been, we think, definitely settled by former adjudications. They are:

1. That the public property of a State cannot be seized and sold to satisfy a judgment or decree.

2. That a court has power in a case properly made to compel the municipal authorities or ministerial officers of a State to comply with the laws of the State in the matter of imposing and collecting taxes.

3. That no court can appoint a receiver, commissioner, or other official with power to collect taxes and apply the proceeds to the satisfaction of a judgment or decree, even after they have been imposed by the proper authorities of the State.

4. That no court can by its judgment or decree order the payment of money out of the State or national treasury when it has not been appropriated by the proper legislative authority.

5. That no court can compel the legislature or executive authorities of a State to impose a tax or issue bonds or appropriate money for any purpose, or to exercise any other authority vested in them by the constitution of the State. Unless the numerous cases establishing these propositions shall be overruled in whole or in part, or unless the present case can

be in some way distinguished from them, it is plain that no enforceable judgment or decree can be rendered by the court on any one of the alleged causes of action; and if that is so, it has, according to all the authorities on the subject, no jurisdiction to hear and determine the controversy.

We confidently submit that the outline of the bill heretofore given and the exhibits made part of it shows conclusively that it is multifarious, and that the demurrer ought to be sustained on that ground, if any good cause of action is shown over which this court has jurisdiction.

Virginia suing in her own right upon a separate and independent cause of action alleged to belong exclusively to her is not the same party as Virginia suing as trustee upon a different cause of action for the use and benefit of others who have no interest in her claim. Moreover, the State could not sue in equity in her own right, in one bill, upon two causes of action so entirely separate and distinct from each other as the claim for money and property alleged to have been delivered to the defendant under the acts of the legislature, and the claim founded upon the compact for the defendant's just proportion of the old public debt, even if she had paid that debt and was entitled to contribution. The foundations of the two causes of action are wholly different, and they are of a wholly different nature and require different judgments or decrees. They involve different questions of law and fact, and a defense which would be good against one would be wholly inapplicable to the other.

"Multifariousness," says Foster, "consists in the joinder of two or more distinct and unconnected grounds for equitable relief each of which might be the foundation for a separate bill. This may occur in three ways—by misjoinder of plaintiffs; by misjoinder of defendants, and by misjoinder of grounds for equitable relief held by and against the same parties."

Foster, Fed. Prac., sec. 71; *Calvert on Parties, Book I*, ch. VII.

Story says:

> "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several of a distinct and independent nature against several defendants in the same bill."
>
> *Story's Equity Pl.*, sec. 271.

Again, it is stated by Story:

> "The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability and a common interest, a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit" (sec. 533).

In Daniel's Chancery Practice, page 335, it is said:

> "It may be that the plaintiffs and defendants are parties to the whole of the transactions which forms the subject of the suit and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

In *Brown v. Guarantee Trust Co.* (128 U. S., 404) this court said:

> "To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must occur: First, the ground of suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Bedsole v. Monroe* (5 Iredell Eq., 313); *Larkins v. Biddle* (21 Ala., 252; *Nail v. Mobley* (9 Ga., 278; *Robinson v. Cross* (22 Conn., 171)."
>
> See also *Shields v. Thomas*, 59 U. S., 253 (18 How.).

In *Walker v. Powers* (104 U. S., 245), a case analogous to the present, there was a misjoinder of plaintiffs and a misjoinder of causes of action. The opinion was delivered by Mr. Justice Miller, and the cases of *Emals v. Emals* (14 McArthur [N. J. Eq.], 114) and *Sawyer v. Noble* (55 Me., 273) were cited and approved.

See also *Dial v. Reynolds* (96 U. S., 340).
Doggett, etc., v. Florida R. R. Co. (99 U. S., 72).

In *Salvidge v. Hyde* (Jac., 151; 5 Mad., 158) the Vice-Chancellor said:

> "In order to determine whether a suit is multifarious, or, in other words, contains distinct matter, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the case, but whether the plaintiff's bill seeks relief in respect of matters which are, in their nature, separate and distinct."

In *Church v. Citizens' Street Railway Company*, 78 Fed., 529, the court said:

> "Multifariousness consists in stating against the same party two or more independent causes of action in the same bill; or it may consist in stating one or more causes of action against a portion of the defendants and another cause of action against another portion of the defendants."

In that action the plaintiffs, who had purchased stock in a corporation, attempted to secure relief for themselves in their own right on one cause of action, and also to secure relief against the same defendants for themselves and all other stockholders on another cause of action. The court held the bill was multifarious.

C. Ziegler v. Lake City Elevated Railroad Company, 76 Fed., 662; the *First National Bank v. Sioux City*, 75 Fed., 154; *Price, receiver, etc., v. Coleman*, 21 Fed., 557, opinion by J. Grey; *Central Bank v. Fitzgerald et al.*, 94 Fed., 16; *Lewarne v. Mexican Internal Improvement Co.*, 38 Fed., 629; *Ætna Insurance Co. v. Smith*, 73 Fed., 318.

In *Metropolitan Trust Co. v. Columbus & Hocking Ry. Co.*, 93 Fed., 689, Judge Taft said:

> "It it also true that a cause of action in favor of one in his own right is as distinct from a cause of action in favor of the same person as trustee as it is from that of a different person. And therefore that a defendant against whom a trustee attempted to unite in the same bill with a cause of action asserted by him as trustee a wholly distinct cause of action in his individual right might object on the ground of multifariousness. In the case before us the defendant railway company might therefore be heard to urge this defect in the bill, because it asks for an enforcement of two different liens held in different rights."

But the court held that the objection to the bill for multifariousness could not be taken by Zohorst and the Second National Bank, "for," said the court, "as to that issue made by the complainant as trustee the right is the same." And again the court said:

> "Upon that issue the complainant as trustee and in its own right has precisely the same interest. And the union of the two causes of action does not embarrass Zohorst or the bank in the slightest; for as to them, the causes of action raised but one narrow question" (page 691).

The difference between that case and the case at bar is obvious at a glance. In the case at bar the bill alleges two entirely separate and distinct causes of action arising out of two unconnected transactions, in one of which it alleges an interest in the plaintiff State, and in the other an interest as trustee, and thus presents two distinct series of issues to be investigated and decided. And, besides, it is perfectly clear that the State of Virginia has not the same interest in the cause of action alleged in her own right and in the one asserted as trustee; nor can the State of West Virginia make the same defense to both.

In *Moss v. Cohen,* 158 N. Y., 240, the plaintiff entitled the action as by himself individually and as executor, but there was only one cause of action alleged, and that was wholly for the benefit of the estate he represented. The court said:

> "There is no pretense or allegation that the plaintiff claimed more than a single right of recovery and that he brought to enforce as executor and for the benefit of the estate he represents";

and it held that there was consequently no improper joinder of parties.

In *Hall v. Fisher,* 20 Barb. (N. Y.), the plaintiff sued in its own name and also as administrator, alleging that he and his intestate were during the lifetime of the latter tenants in common, the intestate owning three-fourths and the plaintiff owning one-fourth of a lot of land; and his claim was that the defendants should account to him individually and to him as administrator for their shares of rents and profits. The court held that the cause of action should have been separately stated. It said:

> "How else can the defendant, if he has a defense of a different character as to each cotenant, avail himself of such defense? He might in this case have one defense against the plaintiff as to his personal claim and another defense as to the interest whose rights he claims to represent as administrator. It cannot be regular for a plaintiff to include in the same action claims in his individual right and as administrator of another. It was never allowed at common law and is not sanctioned or allowed by any statute, not even the Code."

It is evident that the State of Virginia, having been by contract with her creditors discharged from all liability for the one-third of the old debt represented by the certificates, has no pecuniary interest whatever in the alleged claim against West Virginia for which she sues as trustee; and

it will not be contended, we presume, that the owners of the unfunded one-third of the ante-war debt, whether it is represented by the canceled bonds held in trust by the State or by the certificates, have any interest whatever in the claim of Virginia for money and property alleged to have been transferred to West Virginia under the acts of 1863. The unfunded one-third of the old bonds formerly held by the Virginia Commissioners of the Sinking Fund and the Literary Fund is in the same position as that belonging to the other creditors. Virginia has solemnly and repeatedly declared that she was not liable for the one-third, has refused to pay it or any part of it, and has canceled the bonds and issued to the Sinking Fund and Literary Fund precisely the same kind of certificates issued to other creditors. The fact, if it be a fact, that the Commissioners of the Sinking Fund and the Literary Fund are agencies of the State, would simply show that the State owed that part of the debt to herself. But the State has released herself from the obligation for one-third of the bonds originally held by these funds and has thereby withdrawn from them that proportion of the sum which she originally intended they should have. Unless, therefore, the two funds, as agencies of the State, now have a valid claim against West Virginia, their demands have been fully satisfied and extinguished. In any aspect, the claim is asserted by Virginia to recover from West Virginia for contribution on account of money which she (Virginia) has never paid.

The claim against West Virginia under the compact cannot be divided into separate parts, so that Virginia can sue in her own right or for the Commissioners of the Sinking Fund and the Literary Fund for the part represented by the certificates held by those two funds, and also sue as trustee for another part held by different parties. The claim is an entirety and the amount is to be ascertained *in solido*, in the manner provided by the compact, and is to be paid in the

manner provided by the compact. Whatever the amount might be, it was all payable to Virginia herself, and not to the bondholders, who never had a cause of action against West Virginia, even if the State had been suable; and they cannot create a cause of action for their own benefit, in the name of the State, by the process of having Virginia transfer the indebtedness, or a part of it, to them by the enactment of statutes or the issue of certificates or otherwise, and then transferring it back to the State as trustee. But whether the State is, or could be, legally a trustee, or whether, if she be legally a trustee, she could maintain an action in this cause in that capacity, makes no difference in the decision of the question of multifariousness, for the bill and exhibits show that for nearly, if not all, of the unfunded one-third of the debt she actually sues as trustee in this action and not otherwise; and that is sufficient to sustain the contention that there is a misjoinder of parties and a misjoinder of causes of action. Even, therefore, if it should be held that the State is suing in her own right for a judgment and recovery of the amount represented by the certificates held by the two funds, and as trustee for the holders of the other certificates, it would furnish another substantial reason for holding the bill to be multifarious. Besides, it would show that there is a conflict between the personal interests of the trustee and the interests of the *cestuis que trust*, for whatever the trustee might receive in her own right in the distribution of the sum recovered would, to that extent, diminish the portions of the other beneficiaries; and it is a well established rule that plaintiffs whose interests are conflicting cannot unite in the same action—a rule which ought to be rigidly enforced, especially when one of the plaintiffs sues as trustee for the others, and consequently controls the entire proceeding.

Walker v. Powers, 104 U. S., 245.

In view of her own statutes and the agreement she has exacted from the other holders of certificates, it is difficult to

see how Virginia can consistently claim in this action to be suing in her own right to recover any part of the alleged indebtedness of West Virginia on account of the ante-war debt, or, for that matter, on account of any other claim. By statutes she has required her creditors to enter into contracts to defray all the expenses of this proceeding, to release her absolutely, and to accept whatever may be received from West Virginia—whether it be much or little or nothing at all—in full satisfaction and discharge of their claims, and this suit, as alleged in the bill, is being prosecuted under those statutes and agreements.

The bill wholly fails to show a case which entitles the plaintiff to an accounting against the defendant. There are no mutual accounts between the parties, no trust or lien alleged, no fraud, mistake, or concealment, no discovery asked or shown to be necessary, no multiplicity of suits to be avoided, no question as to the application of payments, and no question of apportionment or contribution except upon a basis which is expressly and plainly stated in the compact between the States, and which, therefore, calls for no exercise of the powers of a court of equity. In all its branches, the action is founded on contracts evidenced by the ordinance, and by statutes and constitutional provisions, easily interpreted and involving no question not cognizable in a court of law; and the only possible remedy is a simple judgment for money which a court of law is fully competent to award, if it can be awarded at all in such a case.

In a case where there are no mutual accounts, and no discovery is necessary, the court will not decree an accounting. Story says:

> "One of the most difficult questions arising under this head (and which has been incidentally discussed in another place) is to ascertain whether there are any, and if any, what are the true boundaries of equity jurisdiction in such matters of account as are cognizable at law; we say cognizable at law, for wher-

> ever the account stands upon equitable claims or has equitable trusts attached to it, there is no doubt that the jurisdiction is absolutely universal and without exception, since the party is remediless at law" (Sec. 454).

And again he says:

> "But in cases where there is a remedy at law, there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct in their own nature and yet often running into each other. In the first place, it has been asserted that where in a matter of account the party seeks a discovery of facts, and these appear upon his bill to be material to his right of recovery, there, if the answer does in fact make a discovery of such material facts (for it would be no ground of jurisdiction if the discovery failed), the courts have at once a rightful jurisdiction of the cause and may proceed to give relief in order to avoid multiplicity of suits" (Sec. 455).

The authorities in support of the propositions we have stated are substantially uniform.

In *Russell v. Clark* (7 Cranch, 89), this court said:

> "It is true that if certain facts essential to the merits of a claim, purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes properly from a court of law into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court

of chancery, and permitted to assert his rights in a court of law."

See *Fowle v. Lawrason,* 6 Pet., 495; *Dowell v. Mitchell* and *Mitchell v. Dowell,* 105 U. S., 430 (and the authorities therein cited); *Consolidated Safety Valve Co. v. Ashlan,* 26 Fed., 369; *Lord v. Whitehead,* 24 Fed., 421; *Gunn v. Brinkley,* etc., 66 Fed., 382.

French v. Hay, 22 Fed., 231-237, was a bill for an accounting, and the court said:

> "And were it conceded that by the instrument through which he claims, French became the owner of the judgment, as between himself and Hay, we do not perceive how the concession could aid him in this case. If, as the bill avers, Hay collected the judgment and now holds the money for the use of the complainant, there is a complete remedy at law. This is not a bill for discovery and the aid of the court of equity is not needed."

It is shown by the bill in this case that the State of Virginia has in her own possession all the accounts, vouchers, and documents relating to the amount of the old indebtedness, and all the charges and credits that should be made against and in favor of West Virginia on the settlement provided for in the compact, and she offers to produce them before the master. The prayer of the bill asks that the defendant State "may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth," etc., etc.; but it is not alleged anywhere in the bill that the State of West Virginia has in her possession, or under her control, any such entries, documents, reports, or proceedings.

There is no semblance of a ground for the intervention of a court of equity in this case unless it be the fact that the jurisdiction of such a court can be invoked merely because the accounts necessary to be examined in deciding the controversy between the parties are voluminous or tedious; but in the case of *Brown v. Chase,* 94 U. S., 81, the court said:

> "If the evidence is merely voluminous or tedious, that circumstance is not sufficient cause for transferring a case from a court of law to a court of equity" (p. 824).

But it is unnecessary to discuss this question at length, for the distinction between the common law and equity jurisdiction of the courts of the United States under the constitution has been so often stated and explained in the decisions of this court that it would be tedious to repeat them here.

For cases in which this distinction is stated, see—

Fenn v. Holmes, 21 How., 491;
Robinson v. Campbell, 8 Wheat., 221;
Strother v. Lucas, 6 Pet., 768;
Parish v. Elkins, 16 Pet., 453;
Bennett v. Butterworth, 11 How., 669;
Galt v. Galloway, 4 Pet., 432;
Young v. Porter, 3 Woods, 342;
Scott v. Seely, 140 U. S., 106;
Hipp v. Robbins, 19 How., 271;
Parker v. Winnipiseogee et al., 2 Black, 545;
Grand Chute v. Winniver, 15 Wall., 373;
Lemon v. Coches, 23 Wall., 461;
Killian v. Ebbinghaus, 110 U. S., 468.

There is no allegation in the bill that any authority has been given for the prosecution of this action on behalf of the State of Virginia, except for the single purpose of securing an adjustment of the proportion of the old debt

proper to be borne by the State of West Virginia. The plaintiff State has already determined for herself what her just proportion of the debt is, and neither asks nor is willing to have that question reopened. The only authority for the institution of the suit is found in the act of March 6, 1900, which relates exclusively to the ascertainment of West Virginia's proportion of the debt represented by the certificates deposited with the commission, and provides that "the said commission shall be authorized and empowered by and with the advice and approval of the Attorney-General of Virginia to take such action and institute such proceedings in behalf of the State as may, in the judgment of said commission and Attorney-General, be needful and proper to protect the interests of the State and bring about and carry into effect a settlement as aforesaid." This is the whole extent of the authority given for the use of the name of the State in this action, and it is expressly limited to an action or proceeding on her behalf as trustee for the certificate-holders; and, as we have already shown, this court cannot entertain that part of the bill.

It was held by the court in *Texas v. White* (7 Wall., 700) that the governor of a State had the power to authorize the institution of an action by the State in a case where the interests of the State itself were involved; but no such rule can be applied where the suit is not for the assertion of a claim or the protection of a right belonging to the State, but is for the sole benefit of individuals, and she sues as their trustee. In such a case the legislature possesses the sole authority to direct its institution. But, whether this is the general rule or not, the fact in this case is that the legislature, the supreme authority of the State, did assume and exercise control over the subject, and by an act which was approved by the governor, specifically defined the purpose for which the name of the State might be used.

Ordinarily the objection that the suit was brought without authority from the party named as plaintiff should be

taken by a plea in abatement, but where the lack of authority appears on the face of the bill or complaint, the question can be raised by demurrer. For instance, in a case where diverse citizenship is necessary to confer jurisdiction, and it appears on the face of the bill or complaint that the plaintiff and defendant are citizens of the same State, or even where it does not appear that they are citizens of different State, no plea in abatement is necessary, and a demurrer to the jurisdiction will be sustained.

The demurrer in this case calls the attention of the court to the fact that the bill contains no prayer for a judgment or decree or any other final relief. (*See Equity Rule* 21.) It merely asks that the principles upon which an accounting shall be had "may be ascertained and declared;" that an accounting may be had, and that the plaintiff may be granted such other and further general relief as the nature of the case may require or to equity may seem meet. We do not suppose a decree or judgment for the recovery of money or property can be rendered upon a mere prayer for general relief; but this is not a matter of great importance, because the bill might be amended in this particular.

We respectfully submit that the demurrer should be sustained and the bill dismissed.

J. G. CARLISLE,
For West Virginia.